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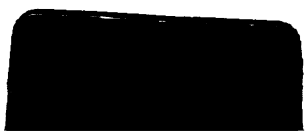

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CASES

SELECTED FROM THOSE

HEARD AND DETERMINED IN THE

VICE-ADMIRALTY COURT

FOR

LOWER CANADA.

RELATING CHIEFLY TO THE

Jurisdiction and Practice of the Court,

OR INVOLVING

Questions of Maritime Law

OF FREQUENT OCCURRENCE IN THE TRADE AND NAVIGATION OF THE RIVER AND GULF OF ST. LAWRENCE.

PRECEDED BY

THE RULES AND REGULATIONS ESTABLISHED UNDER THE AUTHORITY OF THE IMPERIAL PARLIAMENT.

WITH

AN APPENDIX

CONTAINING THE ORIGINAL COMMISSION CONSTITUTING THE COURT, AND OTHER DOCUMENTS RELATING TO THE SAME.

EDITED BY

GEORGE OKILL STUART, ESQ., Q.C.

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PREFACE.

SHORTLY after the Treaty of Paris of the 10th of February, 1763, by which Canada was ceded by the Crown of France to that of Great Britain, His Majesty King George the Third issued a Commission under the Great Seal of the High Court of Admiralty of England, establishing a Court of Vice-Admiralty for the province of Quebec (now called the province of Canada), to have jurisdiction therein according to the civil and maritime laws, and ancient customs of His Majesty's High Court of Admiralty; and this Court, as will appear by the documents in the Appendix, has been continued by repeated Commissions down to the present time, so far as Lower Canada is concerned.

The records of the Court up to the time of the passing of the Imperial Act, 2 Will. 4, c. 51, to regulate the practice in the Vice-Admiralty Courts, and to obviate doubts as to their jurisdiction, afford little

information as to the extent and nature of the cases brought before it, or of the principles of jurisprudence established by them. Many important revenue cases were decided by the Court, in the time of Mr. Kerr, of which it is to be regretted that no reports exist. Two interesting judgments of that gentleman will be found in the Appendix.

Since the Court was established the trade by the St. Lawrence has increased from an average yearly tonnage of 5496 tons to that of 618,926 tons; and its growing importance, and the belief that this must render the jurisprudence and practice of the Court an object of interest, as well to the profession as to those engaged in the commerce and navigation of the river and gulf, has been the motive which has led to the publication of the present volume.

LONDON,
8th March, 1858.

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RULES AND REGULATIONS

Made in Pursuance of an Act of Parliament passed in the Second Year of the Reign of His Majesty, King William the Fourth, touching the Practice to be observed in Suits and Proceedings in the several Courts of Vice-Admiralty abroad, and established by the King's Order in Council.

WHEREAS by an Act passed in the Second Year of His present Majesty King William IV., entitled "An Act to regulate the Practice and the Fees in the Vice-Admiralty Courts abroad," &c., His Majesty is empowered to make such Rules, Regulations, and Fees, and to alter them from time to time, as may be found expedient, in the Vice-Admiralty Courts abroad; and whereas, by an Order in Council of the 23rd of June, 1832, His Majesty has been pleased to authorize us to carry into effect the following Rules, Regulations, and Tables of Fees, to be taken and received by the respective Officers of the said Courts, We send you herewith a Book containing Copy of the aforesaid Act, Order in Council, Table of Fees, and the Regulations of Practice to be observed in the Vice-Admiralty Court under your jurisdiction; and hereby desire and direct, that the Judge, Officers, and Prac-

titioners in the said Court be governed by the same accordingly.

J. R. G. GRAHAM,
T. M. HARDY,
G. H. L. DUNDAS,
S. JOHN BROOKE PETCHELL,
G. BARRINGTON,
H. LABOUCHERE.

To the Vice-Admiral, and the respective Officers and Practitioners of the Vice-Admiralty Court of Quebec.

By Command of their Lordships,
JOHN BARROW.

ANNO SECUNDO GULIELMI IV. REGIS.

CAP. LI.

An Act to regulate the Practice and the Fees in the Vice-Admiralty Courts abroad, and to obviate Doubts as to their Jurisdiction.—23d June, 1832.

WHEREAS it is expedient that provision should be made for the regulation of the practice to be observed in the suits and proceedings in the Courts of Vice-Admiralty in His Majesty's possessions abroad, and for the establishment of fees to be allowed and taken in the said Courts by the respective judges, officers, and practitioners therein: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall be lawful for His Majesty, with the advice of

His Majesty empowered to make regulations and establish fees in the Vice-Admiralty Courts abroad.

his Privy Council, from time to time to make and ordain such rules and regulations as shall be deemed expedient touching the practice to be observed in suits and proceedings in the several Courts of Vice-Admiralty at present or hereafter to be established in any of His Majesty's possessions abroad; and likewise from time to time to make, ordain, and establish tables of fees to be taken or received by the judges, officers, and practitioners in the said Courts, for all acts to be done therein; and also from time to time, as shall be found expedient, to alter any such rules, regulations, and fees, and to make any new regulations and table or tables of fees; and that all such rules, regulations, and fees, after the same shall have been so made and established or altered, from time to time, be entered or enrolled in the public books or records of the said Courts, so far as such practice and fees shall relate or apply to each of such Courts respectively.

Regulations and fees to be enrolled in the respective Courts.

II. And be it further enacted, that a copy of every table of fees so to be from time to time made and established or altered, shall be laid before the House of Commons within three calendar months next after the making and establishment or alteration thereof respectively, if Parliament shall be then sitting, and if not, then within one calendar month next after the subsequent meeting of Parliament.

The tables of fees to be laid before the House of Commons.

III. And be it further enacted, that the several fees so to be established, and no other, shall, from and after the making and establishment thereof, and the entry and enrolment thereof as aforesaid, be deemed and taken to be the lawful fees of the several judges, officers, ministers, and practitioners of the said respective Courts; and such fees only shall and may be demanded, received and taken accordingly.

Fees so established to be the only lawful fees.

IV. And to the intent that all such regulations and fees may be promulgated and publicly made known, be it

Copies of the regulations & tables of fees to be hung up in each Court.

further enacted, that the judge and registrar of every such Court shall cause to be kept constantly hung up and preserved in some conspicuous part of every such Court, and in the office of the registrar, a copy of the table of fees so to be from time to time ordained and established in such Courts respectively, so that the said table may be seen and read by all persons having any business in any such Court and office respectively; and that the books or records containing the entries of the said regulations and tables of fees, as the same shall be in force, shall be at all seasonable times open to the inspection of the practitioners and suitors in every such Court.

Appeal to the High Court of Admiralty in cases of costs.

V. And be it further enacted, that in all cases in which proceedings may be had in any of the said Vice-Admiralty Courts, if any person shall feel himself aggrieved by the charges made by any of the officers or practitioners therein, and the allowance thereof by such Vice-Admiralty Court, by reason that such charges are not warranted by the tables herein-before mentioned, it shall be lawful for such person or his agent, under the regulations to be established in pursuance of the powers given by this Act, by summary application to the High Court of Admiralty to have the said charges taxed by the authority thereof.

Vice-Admiralty Courts to have jurisdiction in certain maritime causes.

VI. And whereas in certain cases doubts may arise as to the jurisdiction of Vice-Admiralty Courts in His Majesty's possessions abroad, with respect to suits for seamen's wages, pilotage, bottomry, damage to a ship by collision, contempt in breach of the regulations and instructions relating to His Majesty's service at sea, salvage, and droits of Admiralty; be it therefore enacted, that in all cases where a ship or vessel, or the master thereof, shall come within the local limits of any Vice-Admiralty Court, it shall be lawful for any person to commence proceedings in any of the suits herein-before mentioned in such Vice-Admiralty Court, notwithstanding the cause of action may have arisen out of the local limits of such

Court, and to carry on the same in the same manner as if the cause of action had arisen within the said limits.

ACT 3 & 4 WILLIAM IV.

CAP. XLI.

An Act for the Better Administration of Justice in His Majesty's Privy Council.

II. And be it further enacted, that from and after the first day of June, 1833, all appeals or applications in prize suits, and in all other suits or proceedings in the Courts of Admiralty, or Vice-Admiralty Courts, or any other Court in the plantations in America, and other His Majesty's dominions or elsewhere abroad, which may now, by virtue of any law, statute, commission or usage, be made to the High Court of Admiralty in England, or to the Lords Commissioners in prize cases, shall be made to His Majesty in Council, and not to the said High Court of Admiralty in England, or to such Commissioners as aforesaid; and such appeals shall be made in the same manner and form, and within such time wherein such appeals might, if this Act had not been passed, have been made to the said High Court of Admiralty, or to the Lords Commissioners in prize cases respectively; and that all laws or statutes now in force with respect to any such appeals or applications shall apply to any appeals to be made in pursuance of this Act to His Majesty in Council.

AT THE COURT OF ST. JAMES'S, THE 27TH DAY OF JUNE, 1832, PRESENT THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS, there was this day read at the Board a Memorial from the Right Honourable the Lords Commissioners of the Admiralty, dated the 19th instant, in the words following, viz.:

"Whereas by an Act passed in the second year of Your Majesty's reign for the regulation of the practice to be observed in the Suits and Proceedings in the Courts of Vice-Admiralty in your Majesty's Possessions abroad, and for the establishment of Fees to be allowed and taken in the said Courts by the respective Judges, Officers, and Practitioners therein, it is enacted that it shall be lawful for Your Majesty, with the advice of Your Privy Council, from time to time to make and ordain such Rules and Regulations as shall be deemed expedient, touching the practice to be observed in Suits and Proceedings in the several Courts of Vice-Admiralty, at present or hereafter to be established in any of Your Majesty's Possessions abroad; and likewise, from time to time, to make, ordain, and establish Tables of Fees to be taken or received by the Judges, Officers, and Practitioners in the said Courts, for all acts to be done therein; and also, from time to time as shall be found expedient, to alter any such Rules, Regulations, and Fees, and to make any new Regulations, and Table or Tables of Fees; and that all such Rules, Regulations, and Fees, after the same shall have been so made and established or altered, shall, from time to time, be entered or enrolled in the public Books or Records of the said Courts, so far as such Practice and

Fees shall relate or apply to each of such Courts respectively.

"And whereas among other provisions of the said Act it is ordained, with respect to doubts that may arise as to the jurisdiction of Vice-Admiralty Courts in His Majesty's Possessions abroad, or to Suits for Seamen's Wages, Pilotage, Bottomry, Damage to a Ship by collision, Contempt in breach of the Regulations and Instructions relating to His Majesty's Service at sea, Salvage and Droits of Admiralty, that in all cases where a Ship or Vessel, or the Master thereof shall come within the local limits of any Vice-Admiralty Court, it shall be lawful for any person to commence proceedings in any of the suits before-mentioned in such Vice-Admiralty Court, and to carry on the same in the same manner as if the cause of action had arisen within the said limits.

"And whereas we deem it of great importance that one uniform system of practice should prevail in all the Vice-Admiralty Courts in Your Majesty's Colonies, we would most humbly submit to Your Majesty that Your Majesty will be pleased by Your Order in Council to authorize us to carry into effect the said Rules and Regulations touching the practice in Suits and Proceedings in the said Courts, as laid down in a Report of certain Referees appointed by the Lords Commissioners of Your Majesty's Treasury, and approved by the Judge and other competent Law Authorities of the High Court of Admiralty of England; and also that the Tables of Fees proposed and approved by the said Authorities may be established by Your Majesty's Order in Council, as the only Fees to be taken and received by the Judges, Registrars, Marshals, Advocates, and Proctors of the Vice-Admiralty Courts of the respective Colonies, as laid down by the Referees, and approved by the Law Authorities above-mentioned.

"And further, that we be authorized to carry into

execution all other provisions contained and set forth in the Act of Parliament aforesaid."

His Majesty having taken the said memorial into consideration, was pleased, by and with the advice of His Privy Council, to approve of what is therein proposed; and the Right Honourable the Lords Commissioners of the Admiralty are to give the necessary directions therein accordingly.

W. L. BATHURST.

RULES AND REGULATIONS

TO BE OBSERVED IN THE SEVERAL

COURTS OF VICE-ADMIRALTY.

§ 1. As to the holding of Courts.—§ 2. Surrogates.—§ 3. Registrar and Marshal to be sworn.—§ 4. Registry Office.—§ 5. Registrar's Duties.—§ 6. Marshal's Duties.—§ 7. Proceedings by Action.—§ 8. Execution of Warrants.—§ 9. Appearance and Bail.—§ 10. Proceeding by Default.—§ 11. Contested Suits.—§ 12. Proceedings by Plea and Proof.—§ 13. Examination of Witnesses.—§ 14. Proceeding by Act on Petition.—§ 15. Suits for Mariner's Wages.—§ 16. Suits for Pilotage.—§ 17. Suits for Bottomry.—§ 18. Causes of Damage by Collision.—§ 19. Suits for Salvage.—§ 20. Causes of Possession.—§ 21. Action to obtain Security for the safe Return of a Vessel.—§ 22. Derelict Cases.—Sections 23, 24, 25, and 26, relating to Pirates, have been omitted.—§ 27. Prosecutions for breach of the Revenue or Navigation Laws.—§ 28. General Rules to be observed in Practice.—§ 29. Tender.—§ 30. References.—§ 31. Taxation of Costs.—§ 32. Incidental Monitions.—§ 33. Commissions.—§ 34. Acts on Petition.—§ 35. Appeals.—§ 36. Regulations as to the Sittings of the Court.—§ 37. As to the Return and Service of Warrants, Monitions, and other Instruments.—§ 38. Interlocutory Decree.—§ 39. Monitions.—§ 40. Proxies.—§ 41. Other General Rules.

§ 1. *As to the holding of Courts.*

COURTS are to be regularly held at short intervals by adjournment from day to day; but the Judge is authorized to sit on any intermediate day as hereinafter provided, in case the despatch of business, or other necessity shall require. The practice which has prevailed in many of the Vice-Admiralty Courts of presenting a petition to the Judge to appoint a day for holding a Court is from henceforth to cease.

The Judge is to be at convenient times accessible at

his chambers, that he may be, if necessary, consulted by the Registrar on any incidental matter, or for the purpose of hearing a motion by council, or directing the sale of perishable goods, or doing any other act which the emergency of a case may render requisite to be done.

§ 2. *Surrogates.*

The admitted advocates of each Court are to be appointed Surrogates, to do, in the absence of the Judge, ordinary, or common form acts (but none other), such as the administering an oath to a witness, decreeing a monition, taking bail, and the like; but in those Courts in which the advocate is allowed to act as proctor also, no judicial act of any kind is to be sped by a practitioner in any cause in which he may be professionally retained or interested.

When an advocate is to be admitted a Surrogate, he is to attend with the Registrar before the Judge, and, on being sworn faithfully to execute his office, is to be admitted. The Registrar is then to make an entry of such admission in the Minute or Assignation Book, and attest the same.

§ 3. *Registrar and Marshal to be sworn.*

The persons to be appointed to execute the several offices of Registrar and Marshal are to be sworn faithfully to perform their respective duties.

§ 4. *Registry Office.*

The Registry of the Court is to be accessible to suitors at convenient hours in the day throughout the year; and a person of competent skill and knowledge is to be in regular attendance there, for all requisite purposes.

§ 5. *Registrar's Duties.*

The duty of the Registrar is to attend all sittings of the Court, and also before the Judge, or Surrogate in chambers, and to make minutes of every act of Court or decree, and to enter the same in an Assignation Book, to be kept for the purpose, which is to form a record of the proceedings of the Court; he is to file, or take the custody of all pleas, depositions, documents, exhibits, and papers brought into Court, recording the receipt thereof in the Assignation Book, briefly stating the papers so received, and the date of their receipt. He is to take the depositions of all witnesses examined upon pleas and interrogatories. If from illness, or any other sufficient cause, he should be unable to perform this duty, he may, with the consent of the Judge, appoint some other competent person to act for him on those occasions. He is to make, or procure to be made, translations of such documents in foreign languages brought into Court as may be required by the Judge, or by the proctor of either party. He is to make and to attest copies of all records, documents, and papers that may be requisite. He is to draw all bail-bonds, or recognizances, and to be present at and attest the execution thereof before the Judge or Surrogate. He is to prepare, sign, and seal all warrants, commissions, and instruments issuing under the seal of the Court. He is also to collect from the practitioners, and receive for the Judge's use, the fees payable to him. He is to have the custody of all monies paid into Court, and to remit them when required, by bills of exchange or other valid securities, to England. He is prohibited from acting either as advocate or proctor in any suit, matter, or proceeding in the Court of which he is a Registrar.

§ 6. *Marshal's Duties.*

The Marshal is to attend the Judge in Court on all court-days. He is to enquire and report as to the sufficiency of persons proposed for bail. He is to execute all such warrants, decrees, monitions, and other instruments as shall be issued from the Court, and be directed to him; and he is to make due returns thereof.

In cases where, in order to avoid expense, it may be deemed requisite to employ others than the Marshal to execute the process at any great distance from the Court, the instrument is to be addressed as follows:—

"To all and singular Mayors, Justices of the Peace, Bailiffs, Constables, Officers, and Ministers of Justice, or literate persons whomsoever, and more especially to the Collector and Comptroller of our Customs at the port of ——;" or in some similar form, if more appropriate to the existing authorities in the colony.

And on those occasions either the Collector or Comptroller of the Customs is to be preferred, unless they are parties to, or interested in, the suit.

And with the same view of avoiding expense, it is expedient that other duties which properly belong to the office of Marshal, and which require to be performed at a distance from the Court, be executed by others; in which cases, commissions are to be addressed specially to any competent persons, by name, resident near the place where such duties are to be performed.

§ 7. *Proceedings by Action.*

These are to commence with an entry by a proctor, in a book to be kept in the Registry for that purpose, called the Action Book, of the action in a given sum sufficient to cover the demand and the probable amount of costs; but this sum is on no account to be excessive.

Before any warrant is issued, the party applying for the same is to exhibit to the Registrar an affidavit, setting forth the nature of the demand, that application for payment has been made without effect to the parties concerned, and that the aid and process of the Court are required for the enforcement thereof. Upon the leaving of this affidavit in the Registry, a warrant, specifying the amount of the action, may issue to arrest the property proceeded against, or the person in cases where personal arrest is lawful; but personal arrest is never to be resorted to when the ends of justice can be otherwise obtained. The proctor, having obtained the warrant from the Registrar, is to make a copy of it, and then deliver the warrant and copy to the Marshal, with instructions for the execution of the process. If the instrument is to be served on a ship, cargo, and freight at different places, as many different copies thereof as are requisite, must be made by the proctor for that purpose. Every copy is to be examined with the original by the Marshal, or the person serving the instrument.

§ 8. *Execution of Warrants.*

When a ship is, or a ship and cargo are, to be arrested, the warrant is to be affixed on the mainmast or some conspicuous part of the vessel for a short time, and a collated copy of it left on board; and when goods only are to be arrested (either for the purpose of proceeding against such goods or the freight due thereon), the warrant is to be affixed for a short time on part of the goods, and a collated copy thereof left thereon, or with any person in whose actual custody the goods may be.

In cases of personal arrest the warrant under the seal of the Court must be shown to the party before he is taken into custody.

A certificate of the service of every warrant executed

by the Marshal is to be endorsed thereon, and signed by him, in which he is to set forth the time when, and the mode by which the service was effected.

When a warrant is served by any other person than the Marshal, there must be, in addition to a similar certificate of the person serving it, his affidavit in the verification thereof.

The warrant having been served is to be delivered back to the proctor, to be by him returned into the Registry at the time when it purports to be returnable; and the Registrar is then to attend with the proctor before a Judge or Surrogate, and enter a minute in the Assignation Book, that the warrant has been returned duly served and executed.

§ 9. *Appearance and Bail.*

After the entry of an action, and before the issue of a warrant, the defendant may voluntarily appear and give bail, and thus avoid the expense consequent on the issue of process.

An appearance alone, without any bail, may be sufficient for the purpose of contesting a suit, but in cases of the arrest of property or of the person, either the demand must be satisfied, or competent bail given before the property or person is released from the arrest.

In order to avoid unnecessary detention when the arrest is to take place at a distance from the Court, a commission for taking bail is to accompany the warrant, as an authority to the party serving the warrant to release the individual or the property on sufficient bail being given.

§ 10. *Proceeding by Default.*

In the case of property arrested, and no party appearing after the return of the warrant, the cause may proceed by default, or *poenam contumaciæ*. To this end, on the

day the warrant is returned, the parties cited and not appearing, are, at the petition of the proctor, to be pronounced by the Judge or Surrogate to be in default, and an entry to that effect is to be added by the Registrar to the minute on the return of the warrant in the Assignation Book.

At the expiration of two months from the return of the warrant, if no appearance be given, the parties cited are again to be pronounced in default, and the promoter is to be entitled to a decree pronouncing for the amount of his demand, and giving him a lien on the property; which decree is to be drawn by the proctor, who, after it has been perused and settled by the Registrar, is to make a fair copy of it for the Court.

An affidavit in verification of all the facts mentioned in the decree is to be made by the party proceeding, which affidavit is to be drawn by the proctor, and submitted to the Registrar.

The proctor is then to prepare a short case detailing the proceedings, which, with a copy of the affidavit, he is to deliver to counsel as instructions to move the Court to sign the decree, of which, when signed by the Judge, the Registrar is to make a minute in the Assignation Book.

On the same Court day, or on any subsequent adjourned Court day, if an affidavit of two persons is exhibited, stating that the property proceeded against is perishable and likely to deteriorate in value, the Judge is to direct a decree of appraisement and sale to issue, of which the Registrar is also to make an entry. This decree is then to be delivered by the Registrar to the proctor, and by the latter to the Marshal, with instructions for its execution. The Marshal is thereupon to select a broker, or other person conversant with the value of the property, and to administer an oath to him justly and faithfully to inventorize and appraise the ship, her

tackle, apparel, and furniture, or the goods, as the case may be. An inventory and appraisement are then to be made, and the Marshal is to cause the property to be publicly advertised by printed bills or otherwise, and, after sufficient public notice of the intended sale, to be sold by auction. The sale being completed, the Marshal is to return the decree (with his certificate as to the execution thereof) into Court, or before the Judge or Surrogate in Chambers, and to bring in at the same time the inventory and appraisement, with a more extended return of the Marshal and appraiser, signed by them, setting forth the particulars and the value of the ship or goods as appraised; and he is also to bring the account of sales and proceeds into the Registry within the time specified in the decree.

If the property be of considerable value, two brokers or appraisers may be employed, provided there is sufficient reason for the same. The property is never to be sold under the appraised value, unless by special order of the Court; and if the appraised value cannot be obtained after an attempt to sell, the Marshal is to exhibit an affidavit of at least two persons, stating that the property had been duly advertised and put up at public auction, when only a certain sum was bid for the same. And if the Judge be then satisfied that all has been done as properly and fairly as if the owner himself had been selling his own property, he is to direct the same to be sold at a reduced price, but not for less than a sum which he in his discretion is to fix. A minute of such order is to be entered by the Registrar in the Assignation Book, and the property is then to be offered again to sale by public auction.

When the proceeds are brought into the Registry, the Registrar may pay out of Court to the party proceeding, on his application for that purpose, the amount of the debt pronounced for, together with the costs of the suit,

the same being first duly taxed and allowed by the Judge.

When a decree pronouncing for the interest of a party proceeding by default has been signed by the Judge, if any other party should also proceed against the property, he will be entitled, on motion of counsel, to have his interest pronounced for by an interlocutory decree, after the warrant has been returned two months, and a second default has been incurred in his particular suit. On this occasion a similar affidavit must be exhibited to that required on obtaining the decree for the interest of the party who had originally proceeded by default.

The balance of proceeds, if any remain in the Registry after satisfying the amount pronounced for and costs, may, on production of the ship's register, or other satisfactory evidence of ownership, be paid out to the owner. But if his application be made within a year and a day from the return of the warrant, he is to give bail to answer latent demands.

The sufficiency of sureties is to be reported upon by the Marshal, and the bail must be given in the manner hereinafter mentioned respecting bail to answer an action in a contested suit.

In a case proceeding by default or *in pœnam*, the owners of the property are to be allowed to contest the suit at any time before the expiration of a year and a day from the return of the warrant; but if they neglect to appear until they have been pronounced in default, they must, on appearing, pay contumacy fees, viz. all the costs occasioned by such their neglect, including the charges for keeping possession beyond the time specified in the warrant for its return, which costs are to be taxed by the Court.

§ 11. *Contested Suits.*

In contested suits the property remains in the custody of the Court, but if the release thereof be a material object to the owner, or to the party defendant, it may be delivered to him on sufficient bail by two persons severally in the amount for which the action has been entered. Causes of possession, however, are not bailable unless by the special direction of the Judge. Bail to answer an action, and all bail bonds or recognizances are to be given in the following manner:

The proctor who is to produce the sureties is to furnish the Marshal and also the adverse proctor with the particulars in writing, of the names of the proposed bail, their address and occupation; and the Marshal, having made due enquiry as to their sufficiency, is to deliver his report thereon to the proctor proposing the bail, who is then to instruct the Registrar to prepare the bail-bond. The Registrar, the two proctors, and their sureties, are then to attend the Judge or Surrogate, and, upon the recognizances being duly entered into, the property is to be released upon an instrument to be drawn by the Marshal and issued immediately after bail has been given. This form is to be dispensed with when the bail is taken by commission.

It is competent to the adverse proctor to object to the proposed sureties, in which case the Judge is immediately to decide on the validity of the objections. If the adverse proctor do not attend at the production of the sureties, the bail may be taken *ex parte* upon an affidavit, to be prepared by the proctor producing them, that he has given twenty-four hours' notice in writing of their names, address, and occupation (*a*), which affidavit is to be left in the Registry.

(*a*) See Supplementary Rules, of 2nd March, 1848.

Should a party appear under protest, either objecting to the jurisdiction of the Court or on any other ground on which he means to contend that he is not liable to answer the action, his appearance must be entered by the Registrar in the Assignation Book as given under protest, and the party so appearing is to be assigned to deliver his act on protest to the adverse proctor within a limited time. The same course of proceeding is to be pursued on the act on protest as in cases of acts on petition (hereafter stated) up to the time of the hearing, when the Judge is either to pronounce for the protest and dismiss the suit, or overrule the protest and assign the party to appear absolutely, and the cause is then to proceed as if no appearance on protest had been given.

In contested suits the facts may be established either by libel or plea, and the examination of witnesses thereon styled "Plea and Proof;" or by an "Act on Petition," supported by affidavits, to which may be annexed exhibits or other documents to be verified in the affidavits.

§ 12. *Proceedings by Plea and Proof.*

When an appearance has been entered, the defendant is entitled to an assignation on the plaintiff to exhibit a libel within a time to be limited by the Judge.

The libel or plea is to be drawn by the plaintiff's proctor and settled by counsel, and then a fair copy, signed by counsel, is to be made for the Court, and brought in pursuant to the assignation; a copy is also to be delivered to the adverse proctor, and each proctor is entitled to make copies for the use of his counsel at the hearing.

There may be annexed to the libel or plea, documents or exhibits pleaded or referred to therein, of which copies are to be made in like manner, the originals being brought into Court. And upon the libel or plea being brought

in, the Judge is to assign to hear, on admission thereof, on the next court-day, or at a time to be named by him. The defendant's proctor may then lay the libel or plea before counsel for his advice, if the same be opposable, and if it be deemed by him not sufficient in law (supposing it be true) to warrant the plaintiff's prayer, the admission of it may be opposed; whereby if the plaintiff has no legal cause of action, the suit may be stopped *in limine*, it being the duty of the Judge to reject all pleas, which, if assumed to be true, will not justify him in pronouncing a decree for the party giving in such plea. Or if the plea contains matter unnecessary or irrelevant to the cause of action, or is drawn in too diffuse or argumentative a manner, the admission thereof may be opposed. Upon these objections coming on to be debated, the Judge will order the plea to be admitted, reformed, or altogether rejected as he shall see cause. If ordered to be reformed, the Judge will in his discretion direct the objectionable matter to be expunged and other points modified. If ordered to be rejected, such rejection puts an end to the suit.

On the libel being debated, a case on each side is to be prepared by the respective proctors, and delivered to counsel with copies of the libel and of the exhibits, if any, which copies, however, must afterwards serve for the use of the counsel at the final hearing.

Pleas, the admissibility of which is not objected to, are admitted to proof of course.

Pleas or allegations given in a subsequent stage of a cause, may be admitted, reformed, or rejected in a similar manner.

On the libel being adittmed, the proctor giving in the same is to be assigned to prove its contents by evidence within a time to be limited by the Judge, and the party giving in the plea is entitled, if he desires it, to the personal answers in writing of the adverse party. In that

case a decree for answers is to be extracted from the Registry and served on the party, by shewing him the original under seal, and leaving with him a copy thereof. The answers are to be drawn by the proctor for the party required to give in the same, who must answer specifically to all the facts or allegations in the plea which are within his own knowledge, by either admitting or denying the same; and as to all matters, he must answer to his belief or disbelief.

No extraneous or irrelevant matter is to be introduced, but the party may set forth any matter necessary to explain his answer. If any facts are introduced which are capable of proof by witnesses, they must be established by evidence regularly taken on a plea. The answers are to be settled by counsel, and then the party attended by his proctor is to be sworn to the truth thereof before the Judge or Surrogate in the presence of the Registrar, who is to make and sign an attestation at the foot thereof. The Registrar is then to file them and make a minute in the Assignation Book, of their having been sworn and brought into Court. The adverse proctor may immediately inspect them without waiting for publication, and may have an office copy of them. And if they be insufficient, redundant, or contain matter not pertinent, may be objected to in the same manner as a libel or plea.

If after the return of a decree personally served, the party does not give in his answer within the time assigned, the Judge may decree an attachment against him for his contumacy; but notwithstanding this measure, the proctor for the plaintiff may proceed with the production of his witnesses and take other requisite steps in the cause.

§ 13. *Examination of Witnesses.*

The name of the witness and a designation of the

specific articles of the libel or plea on which he is to be examined, must be delivered to the adverse proctor and to the Registrar or Examiner, whereupon the proctor giving in the plea is to attend the witness and produce him before the Judge or Surrogate, in Court or chambers, when the witness is to be immediately sworn in the presence of the Registrar. Due notice of his intended production must be given to the adverse proctor, who may attend if he think fit. On the witness being so sworn, the Registrar is to make an entry thereof in the Assignation Book.

The deposition in chief is not to be taken upon written interrogatories, but by relevant questions put *viva voce* by the Registrar or Examiner, and arising out of the circumstances pleaded, but not so put as to lead the witness. If there are several pleas, witnesses are to be examined on each plea. The witness must not be dismissed until the lapse of twenty-four hours from the time of his production, so that the adverse proctor may have an opportunity to cross-examine him by interrogatories in writing if he think fit; and this time may be extended on reasonable cause to be shewn by the proctor through the Registrar to the Judge. Such interrogatories are to be drawn by the adverse proctor, and, when practicable, settled by counsel. They are then to be copied for and signed by counsel, and delivered to the Registrar, with instructions as to the particular interrogatories to be administered to each witness. When the witness has been examined in chief, and also upon interrogatories, if any are to be administered, the depositions in chief, and also the answers to the interrogatories (if any,) are to be read over to or by the witness and signed by him, and he is then to attend with the Registrar before the Judge or Surrogate in chambers, and make a declaration that he knows the contents of his deposition, and that the same are true in virtue of the oath by him taken

on his being produced; and an attestation thereof is to be made at the foot of the deposition by the Registrar or Examiner.

The evidence of the witnesses is in all cases to be kept closely sealed, and the contents thereof are not to be divulged until publication shall have been passed; after which, but not sooner, the proctor administering the interrogatories, if any are administered, is to deliver a copy thereof to the proctor producing the witness.

In the event of any witness refusing to attend to be examined, his necessary expenses having been tendered to him (but not otherwise,) a compulsory or subpœna, to be prepared by the Registrar, may be extracted, and served on the person so refusing to attend, by shewing to him the original instrument under seal, and leaving with him a collated copy thereof, and if he do not appear to this process, an attachment may issue against him for his contempt.

The witnesses for the plaintiff being all examined, his proctor may on the first court-day afterwards pray publication of the evidence, which is to be decreed to take place at a time to be fixed by the Judge; and at the expiration of that time it is imperative on the opposite party to plead if he intends to do so at all; for this purpose, he is to attend before the Registrar or Surrogate, and declare in a minute of Court that he intends to offer an allegation or counter-plea, and the same must be brought into Court within a reasonable time, to be assigned by the Judge. In that case, publication of the evidence must be stayed until the allegation be disposed of, either by being admitted or rejected by the Court, or by the party abandoning the intention of giving it in. If admitted, publication must be stayed until the whole evidence in the cause be taken. In the event of no allegation or counter-plea being given, or, if given, being rejected by the Court, or withdrawn by the party, publica-

tion of the evidence is to take place; and thereupon the depositions may be inspected on each side, and copies thereof furnished to the parties at the request of their proctors, who may make copies thereof for their respective counsel.

After the evidence has been inspected, neither party can claim as a matter of right to give any further plea or allegation in the principal cause; but if the Judge shall be satisfied by affidavit that there is any matter important to the issue, which could not have been pleaded before by reason that knowledge thereof had not come to the party prior to, or that the fact had occurred after the publication, the Judge in his discretion may allow such matter to be pleaded.

Allegations exceptive to the testimony of witnesses, may be given after publication in cases only where the matter on which they are founded, arises out of the evidence of the witness or witnesses excepted to, and where the contradiction, if proved, would tend materially to destroy his or their credit; but no allegation exceptive to the testimony of witnesses is to be admitted, if the facts it contains either have been or could have been pleaded before publication. After publication, no allegation, pleading generally that the witness is not worthy to be believed on his oath, is to be received. Any such allegation, when offered, must precede publication, and must plead generally that the witness is of bad character and reputation, and not to be believed on his oath without imputing to him any specific charges.

When several pleas are given in a cause, witnesses are to be examined on each plea; and all other steps are to be pursued in the same manner as directed in respect of the plaintiff's libel.

It is the duty of the proctors to take especial care that the libel and defensive allegation contain all the facts material to the decision of the cause, so that several pleas may not unnecessarily be given.

When publication shall have taken place on all pleas, the cause is to be set down to be heard at a time to be appointed by the Judge. Counsel are to be furnished with copies of all material papers, viz. pleas, exhibits, and depositions of witnesses, but not of warrants, decrees, or other formal instruments, unless from circumstances, the contents of such instruments may be material to the discussion of the cause. A case for hearing on each side is to be prepared by the respective proctors, briefly stating the proceedings which have taken place, and calling the attention of counsel to the decree which each party may pray the Judge to pronounce. The evidence is not to be abstracted, nor are documents of which counsel are furnished with copies to be more than merely described in the case. All lengthened details are to be avoided, but the attention of counsel is to be directed to the principal points. A reasonable fee is to be paid to counsel on the hearing; and if the case takes more than one day in argument, a moderate additional or refreshing fee is to be given for each subsequent day. Definitive sentences in writing are only requisite in derelict and piratical cases. In other causes the judgment may be given by interlocutory decree, and entered by the Registrar in the Assignation Book.

If it become necessary to enforce a judgment, a monition is to be taken out against the party principal and his bail, and served in the manner before directed in regard to instruments requiring personal service. Upon the return into Court of the monition, with a certificate of its due service indorsed thereon, and the tenor thereof not being obeyed, the Judge, upon motion of counsel, may decree an attachment against the person of the party monished for his contempt; directing either the attachment to issue immediately, or to be suspended for a reasonable time, as circumstances may in his judgment require. This attachment is to be extracted from the

Registry. The previous service of a monition may not always be necessary. Where the disobedience is manifest upon the face of the proceedings, and it is clear that the order of the Court must be known to the party, an attachment may be decreed without a previous monition; but in cases where sureties are to be attached, a previous monition is indispensable. Upon compliance with the order for disobedience of which the attachment issued, and upon payment of the costs of the attachment, the Marshal, or other person executing it, is to release the party, certifying to the Judge fully what has been done; but in cases of doubt he may resort to the Judge for directions previous to the release.

§ 14. *Proceeding by Act on Petition.*

In case bail has been given to the action, a minute is to be made in the Assignation Book by the Registrar, assigning the proctor for the party proceeding to deliver his act on petition to the adverse proctor by a time to be fixed by the Judge. The proctor is then to set forth the facts of his case in a plain narrative manner, without argument, and concluding with his prayer. This, having been settled by counsel (for which purpose he is to be furnished with a copy), is to be copied fair for the Court, and then delivered to the adverse proctor that he may reply thereto, and with the reply, it must be returned to the proctor of the party proceeding, that he may make a rejoinder thereto if necessary. The reply and rejoinder must also be settled by counsel in the same manner as the act.

The facts alleged in the act on petition are to be supported by affidavits; and any necessary exhibits, or documents annexed thereto, are to be verified in such affidavits, which are to be confined to the material averments, and are not to be settled by counsel.

Should any delay occur in the delivery of the act from one proctor to the other, either of them may allege the same, in the presence of the Registrar, before the Judge, who is to direct the act to be returned by a time to be specified; and if it be not returned by that time, or good cause shewn for the delay, the Judge is to assign to hear the act on petition *ex parte*, that no unnecessary postponement may take place, for which purpose a copy of the act, instead of the original, together with the affidavits on behalf of the party, must be brought in by the proctor applying to have the cause so heard.

When the article is concluded, it is to be signed by both proctors who are to attend before the Judge or Surrogate, in the presence of the Registrar, to bring in the same, together with the original affidavits and exhibits. No further affidavits or documents are to be afterwards received, unless by leave of the Judge obtained on special application. The Judge is then to appoint the cause for hearing, and thereupon one copy of the affidavits and exhibits is to be made for each of the counsel, and one for the adverse proctor, to be delivered to him when the originals are brought in. The adverse proctor is also to make copies for his own counsel. The same rules, as to the preparing the case for hearing, delivering copies of papers, fees to counsel, and the same proceedings for enforcing obedience to the decree, are to be observed as in a cause conducted by plea and proof.

§ 15. *Suits for Mariners' Wages.*

The same regulations as to the arrest of a ship, the subsequent proceeding by default or *in pœnam*, and the rules for conducting a cause by plea and proof, are to be applicable to the suit of a mariner for his wages, which is called a cause of subtraction of wages, in which the mariner may proceed against the ship, freight, and

master, or the ship and freight, or the owner or the master alone; and any number of mariners, not exceeding six, may proceed jointly in one action.

When an appearance is given, the proctor for the party proceeding is entitled to an assignation on the defendant to bring into Court the mariner's contract and ship's books; and he is not compelled to file his libel until they are so brought in.

The libel, if in common form and pleading no special matter, should state the hiring, rate of wages, performance of service, and the refusal of payment; and should have annexed to it a schedule, stating the whole amount of wages, with the sum received on account, and the balance claimed to be due. This plea is termed a summary petition, and should not be settled by counsel.

§ 16. *Suits for Pilotage.*

Suits for the recovery of pilotage, where no party appears to defend the action, may be conducted by default or *in pœnam*. When contested, the proceeding will be by plea and proof; the libel or plea, as in suits for wages, if containing no special matter, is also called a summary petition, and need not be settled by counsel.

§ 17. *Suits of Bottomry.*

These suits may likewise be conducted by default or *in pœnam*, and ships may be sold, in virtue of a decree of the Court, for the payment of bottomry bonds without any appearance having been given to defend the action.

When the validity of the bond is contested, the cause generally proceeds by act on petition and affidavits, but the party promoting the cause may, if he thinks proper, proceed by plea and proof: and it is competent to defendant, on his appearance, to require the cause to be

conducted in that manner, for which purpose he must pray the Judge to assign the promoter to bring in a libel.

Before the warrant is extracted from the Registry, the original bond must be exhibited to the Registrar in addition to the usual affidavit.

§ 18. *Causes of Damage by Collision.*

These causes may also be prosecuted by default or *in pœnam*. When defended, the suit is conducted by plea and proof, and differs in no respect from that mode of proceeding already detailed.

Suits of Damage by Beating or Assault on the High Seas.

In these cases the suit is by plea and proof, and the warrant is necessarily against the person.

Prosecutions for contempt in breach of the Maritime Law, and of the Regulations and Instructions Relating to His Majesty's Service at Sea.

These prosecutions can only be instituted on complaint by an officer in His Majesty's Navy, and under the directions of the Lord High Admiral, or the Commissioners for executing the office of Lord High Admiral of the United Kingdom, or of some one of the Admirals or Commanders in Chief of the naval squadrons abroad, and are to be conducted in the following manner :—

An affidavit of two persons is to be exhibited by the proctor for the Crown, stating the name and description of the party intended to be proceeded against, and detailing the particulars of the offence committed, which affidavit, with a short case, is to be delivered to the advocate for the Crown to move the Judge to decree the warrant of arrest, who, in making the decree, is to specify the amount of the bail to be given as he shall consider sufficient to ensure the personal appearance of the party

prosecuted when judgment shall be pronounced. This amount is to be stated in the Action Book and on the face of the warrant. The Marshal is then to execute the warrant by the arrest of the person of the offender, who is to be liberated on giving sufficient bail, which is to be taken in the usual manner.

On the appearance being given, the proctor for the Crown is to be assigned to exhibit articles pleading the offence within a short time to be specified by the Judge.

These articles are to be prepared by the proctor for the Crown, and may be settled by counsel, and the cause is then to proceed like other suits, by plea and proof, with the following exceptions:

1st. On the articles or plea being admitted to proof, the defendant must be assigned to declare in act of Court, within a reasonable time, generally whether he denies the facts pleaded, which is termed giving a negative issue, or whether he confesses them, which is termed giving an affirmative issue.

2ndly. In case of an affirmative issue, the judgment of the Court may be immediately pronounced, on which occasion the defendant is to be allowed to exhibit affidavits in mitigation of punishment, but not to deny the offence charged.

3rdly. Extended personal answers in writing to the different positions or averments of the articles cannot be required from the defendant.

4thly. Where a negative issue is given, the defendant may be at liberty to offer a defensive plea.

After the evidence is taken, if the Judge shall decide that the charge is established, he will proceed to give sentence, imposing the fines due by law on the defendant and condemning him in the costs. In very aggravated cases, the defendant may also be imprisoned for a limited time. Affidavits in mitigation may be offered and are to be received when the offence has been proved by evidence.

§ 19. *Suits for Salvage.*

The ordinary course of proceeding is by act on petition, but in cases where no appearance is given these suits may be prosecuted by default or *in pœnam*. The property must on no account be released from arrest until a value shall be agreed upon between the parties and alleged in minute of Court, which is to be entered by the Registrar in the Assignation Book.

If the value cannot be agreed upon, a decree of appraisement must be extracted by the proctor for the salvors, and executed and returned into Court before the property is released. This constat of the value is necessary both for regulating the amount of bail to be taken, and for guiding the Judge, at the final hearing, in fixing a proper remuneration for the services of the salvors, with reference to the value of the property saved.

§ 20. *Causes of Possession.*

These causes are to commence by the entry of an action at the suit of the owners or owner of a majority of interest in the ship, and a warrant is to be issued to obtain possession thereof from any party who may withhold the same. No amount of action need be inserted in the Action Book, or on the face of the warrant.

An affidavit of the party proceeding is to be prepared by the proctor, and laid before counsel, with a short case stating the circumstances, in order to move for the warrant, which can be obtained only on motion of counsel. The affidavit need not previously, as in other cases, be left in the Registry. On this occasion, the Judge or Surrogate is to be attended by the proctor, counsel, and Registrar; and the Judge, on reading the affidavit, if it be satisfactory, will, on motion of counsel, decree the warrant citing all persons in general to appear and answer

to the party proceeding in a cause of possession. The warrant having been served on the ship is to be returned into the Registry, and if no appearance be given within a month from such return, the Judge, if satisfied that the party proceeding has a majority of the legal interest, is, on the affidavit originally brought in or on further proofs, if necessary, being exhibited on motion of counsel on the next regularly adjourned court-day, by interlocutory decree to order possession of the ship to be delivered to the party proceeding, or if necessary assign a further limited time for entering an appearance, and on any subsequent regularly adjourned court-day in like manner pronounce his decree, which is issued by the Registrar from the Registry.

Should any party appear to contest the right of possession, the cause is to proceed by act on petition and affidavits, the ship remaining in the custody of the Court until the final hearing, because the object of the suit, which is to obtain actual possession of the property, cannot otherwise be secured.

Upon an interlocutory decree being pronounced in favour of either party, a decree of possession is to be issued accordingly.

During the dependence of the suit on proof by affidavit being exhibited that the ship's register is in the possession of any person whomsoever, a monition may be issued requiring him to bring it in, or shew cause why it should not be brought into the Registry to abide the event of the suit. Or, after the hearing, should the ship's register remain in the possession of any person, the Judge may, on proof thereof, issue a monition directing him to deliver up the same to the party in whose favour the decree has been made.

Causes of possession may also be conducted by plea and proof at the option of either party.

§ 21. *Action to obtain Security for the safe Return of a Vessel.*

Actions of this description occur when a part owner is dissatisfied with the management of his co-owners, and requires the ship to be restrained from proceeding on a voyage until bail shall be given for her safe return to the port to which she belongs.

An affidavit of the party is first to be made setting forth the number of shares of which he is the legal owner, that he is dissatisfied with the management of the ship, and is desirous of obtaining bail for her safe return to the port to which she belongs, to the amount of the value of his shares, which value is to be stated in the affidavit. And upon this affidavit, which need not previously be left in the Registry, the Judge or Surrogate in chambers is to be moved by counsel to issue the warrant of arrest.

The action should be entered in the amount of the value of the shares of the party proceeding, and in a further moderate sum to cover the costs; and on bail being given, the vessel is to be released and allowed to proceed on her voyage.

In case of the parties differing as to the value of the vessel, she must be appraised under the authority of the Court; and the actual value of the shares of the party proceeding at the period of giving bail, whether the ship be appraised or not, is the amount to be recovered in case the bond shall ultimately be pronounced to be forfeited.

The costs of the arrest are to be borne by the party proceeding; and the costs of giving bail by the defendant, unless the Judge shall see cause to order otherwise.

In the event of the loss of the vessel before her return to the port to which she belongs (until which time the bail bond remains in force), the party principal and his sureties may be called on by monition to shew cause why they should not bring in the amount of their recognizances,

in order to abide the judgment of the Court. To obtain this monition an affidavit must be exhibited, showing that the bond has become forfeited, and it must be moved for by counsel before the Judge or Surrogate. The monition when obtained requires personal service.

Should an appearance be given and the suit be contested, the proctor of the party proceeding is to be assigned to deliver an act on petition to the adverse proctor, and the cause is then to take the same course as other cases conducted by act on petition.

§ 22. *Derelict Cases.*

In cases of derelict the action is to be entered and the warrant extracted by the proctor for the Admiralty, without any amount of action being stated in the Action Book or on the warrant, and no affidavit is necessary to obtain the warrant, which, when issued, is to be served by affixing it for a short time on the ship or goods found derelict, and by leaving thereon affixed a true copy thereof. The warrant is then to be returned by the proctor into the Registry.

After the lapse of three months from the return of the warrant (the property remaining in the custody of the Court), the Judge, on the next regularly adjourned court-day, at the petition of the proctor, and on his allegation in Court that the warrant has been returned upwards of three months, and that no appearance has been given, is to decree a monition to issue, calling upon all persons to appear and shew cause why the property should not be condemned, at the expiration of a year and a day from the return of the warrant, as droits and perquisites of His Majesty in his office of Admiralty. The monition is to be made returnable at three months after its date, and is to be served by affixing the original for a short time either on the Court-House or on the Exchange, or place of com-

mon resort of merchants, or as the usage of the colony or settlement may be, and by leaving thereon affixed a true copy thereof. The object of this general service is to give the utmost publicity, so that the contents of the monition may be most likely to reach the knowledge of all parties interested. After this service, the monition is to be returned into the Registry, with a certificate of service indorsed thereon.

If the property be in a perishable condition, and the Judge be satisfied by affidavit at any period after the arrest that it would be for the benefit of all parties interested therein that the same should be forthwith sold, it may be appraised and sold under the direction and authority of the Court, and the proceeds paid into the Registry.

At the expiration of a year and a day from the return of the warrant, if no claim or appearance be given for the owners, the Judge, on the next regularly adjourned court-day, is to proceed to condemn by sentence the property as droits and perquisites of His Majesty in his office of Admiralty. The sentence is to be prepared by the proctor, who is to make a fair copy thereof, for the Judge's signature, which is to be signed in Court in presence of the Registrar, and a certificate is to be added by the Registrar on the sentence, and a minute made in the Assignation Book of the same having been so signed.

The owners of property proceeded against as derelict, may appear at any time before the termination of the cause, and claim the same without being liable to any fees of contumacy incurred prior to their appearance. The claim with an affidavit in verification thereof, is to be drawn by the proctor, and should set forth the name, residence, and occupation of the owner, the title of the party to, and the identity of, the ship or goods claimed. Documents or exhibits in support of the affidavit may

be annexed thereto. When the claim and affidavit have been settled by counsel, the proctor is to attend his party before the Judge or Surrogate, to be sworn to the same in the presence of the Registrar, and the Judge will then assign to hear on admission thereof on the next court-day, or at any other time to be by him fixed, of which notice is to be given to the parties. A copy of the affidavit and claim is to be given to the proctor for the Crown, and if the counsel for the Crown be satisfied that the party claiming is entitled to restitution of the property, he is to consent to the same being restored, which on motion of counsel before the Judge may be immediately done on payment of the salvage, and the expenses on behalf of the Crown. The instrument of restitution is to be prepared by the Registrar, and extracted from the Registry by the proctor for the claimant. The interests of salvors are always to be protected, and to this end, if restitution be consented to, and if salvage has not been previously paid, bail to our Sovereign Lord the King, in his office of Admiralty, in a sum sufficient to answer salvage, must be given by two persons on behalf of the owners before the instrument of restitution is to be issued.

If the title to the property is contested, the cause must come on to be heard in Court; a case and papers being delivered to counsel as in other contested causes.

§ 27. *Prosecutions for breach of the Revenue or Navigation Laws.*

An affidavit is to be made by the seizer, detailing the grounds of the seizure and the circumstances attending the same, to which, in the case of a vessel being seized, is to be annexed all original papers that have been delivered up at the time of seizure, and which must be verified in the affidavit. Or if the ship's papers have

been concealed, thrown overboard, or destroyed, the fact of such concealment or destruction should be stated in the affidavit.

The affidavit is to be exhibited to the Judge or Surrogate, who is to decree a monition to issue, returnable fourteen days after service, citing by name the owners, or persons implicated (if known) in special, and all others in general, to appear and shew cause why the forfeiture should not be decreed, and the penalties due by law pronounced for: but where the parties are not known the monition must only cite all persons in general.

When the monition specifies the names of the parties cited, it must be personally served on them like other instruments requiring personal service, and must also, like other monitions where the names of parties are not mentioned, be served on the Exchange or Court-house, or other public place, as before directed respecting instruments requiring service against all persons in general.

The monition having been served and no appearance being given, the Judge is to proceed by interlocutory decree to condemn the property: but such condemnation is not to take place on any other than a regularly adjourned court-day, and not until the expiration of fourteen days from the return of the monition, and if it has been personally served, the Judge may, without requiring any further evidence than the affidavit to lead the monition, pronounce for the penalties due by law.

If a personal service of the monition cannot be effected by reason that the persons named therein have purposely absented themselves to avoid the service, the Judge may pronounce a similar decree; but if he has reason to believe that the persons named in the monition are *bonâ fide* ignorant thereof, he is to reserve his judgment so far as relates to the penalties sued for, and also as to the property, should any doubt arise upon the evidence.

In the case of a monition citing all persons in general, and not describing any person by name, no penalties can be pronounced for, but if the persons by whom the offence was committed shall afterwards be discovered, a subsequent monition may be issued in the same suit against him or them for recovery of the penalties.

In order to move for the interlocutory decree, a case, with a copy of the affidavit, must be delivered to counsel.

A claim may be given on behalf of the owners at any time before the interlocutory decree, and the claimant may, if he think fit, require the seizer to file an information or libel, to which the claimant may give in a responsive plea or allegation, and the case will then proceed by plea and proof in the manner before mentioned.

To the claim must be annexed an affidavit, containing the names, descriptions, and residence of the owners, and a detail of all the circumstances on which the claimant means to rely as the grounds of his defence.

The claim and affidavit are to be prepared and given in as directed in derelict cases; but in compliance with the Act of 6 Geo. 4, c. 114, s. 62, security must be given on behalf of the claimant in the sum of 60*l.* sterling, to answer costs before any claim can be received.

Upon a claim being filed, the Judge, with the consent of the Collector and Comptroller of the Customs, may order the delivery of the property to the claimant on his giving bond, with two sufficient sureties, to answer double the value of the same, as provided by the 58th section of the said Act.

The Court, on the application of the officer of the Customs, or parties interested, may, at any time before condemnation, direct the property to be sold, if it shall satisfactorily appear by affidavit that a sale will be beneficial to all parties interested.

When a claim is given, and no libel prayed, the Court may proceed to adjudge the case upon the facts and

circumstances stated in the affidavits on both sides: but if it shall appear to the Judge that the case is not sufficiently proved by such evidence, he may direct an information or libel to be filed by the seizer, and give leave to the claimant to file a responsive allegation: in which case witnesses are to be examined on both sides, and the cause will proceed as in plea and proof cases. After condemnation, the sale must take place according to the provisions of the 56th section of the said Act.

In order to remedy complaints which have been made of the burthensome law charges in the Colonies, on proceedings in revenue cases of small value, it is directed, that any number of seizures, not exceeding in the aggregate value 300*l.*, and not individually exceeding the sum of 100*l.*, may be included in one monition, and that different seizing officers may proceed conjointly in the same prosecution,—care being taken that the monition, and also the libel where that proceeding is required, be drawn conformably with the several circumstances, and that the different seizures be described in separate articles or counts of the libel or information. And to obviate any possible delay in the proceedings of the seizing officer, any claimant is to be at liberty to take out a monition against the seizer, returnable three days after service thereof, requiring him immediately to proceed to the adjudication of the property seized. For this purpose, and also to enable the seizer to determine whether to proceed separately as to one seizure, or to wait for the chance of including other seizures in the same process, by a consideration of the expenses of warehousing and custody of the seizure, the seizer is, without delay, in all cases where the probable amount of the seizure does not exceed in value 100*l.* to report the facts to the Registrar of the Court.

In cases where it shall be deemed necessary to proceed

immediately without waiting for other seizures, and the value is under 100*l.*, the several charges of the proceeding and adjudication are to be reduced 25*l.* per cent. upon the usual charges; and if the property separately proceeded against does not exceed the value of 50*l.*, one half of the usual fees only are to be charged.

§ 28. *General Rules to be observed in Practice. Subduction of an Action.*

If a party proceeding, determine to abandon his suit, or has compromised the same, he may at any period be allowed to subduct the action; to which end, the proctor who has extracted the warrant is to sign a short entry to that effect in the Action Book, and the property, if any have been arrested, is to be immediately released.

§ 29. *Tender.*

Whenever a tender is made on behalf of a defendant to pay a certain sum of money, the sum tendered must be brought into the Registry, and an undertaking given for payment of the costs incurred up to that time; this must be done before the Judge or Surrogate, in the presence of the Registrar and the adverse proctor, and a minute thereof is to be entered in the Assignation Book, and the proctor for the plaintiff is to be assigned to declare whether he will accept the tender or not, within a time to be limited by the Judge.

If the tender be refused, and the Court shall ultimately consider the same to have been sufficient, the plaintiff, in general cases, is to be subject to all the costs incurred subsequent to the refusal, but under special circumstances, where the enforcement of this rule may be attended with injustice or hardship, the Court may

exercise its discretion by forbearing to condemn him in costs.

§ 30. *References.*

In cases where a reference of the subject in litigation may be expedient, the Judge, either for his own satisfaction or at the instance of either of the parties, may refer any accounts or demands, or any matter incidental thereto, to the Registrar, directing him to take to his assistance one or two merchants, and to investigate and report on the matter. The merchants to be selected by the Registrar and approved by the Judge.

The reference being ordered, the Registrar is forthwith to make an appointment with the proctors of the parties and with the assistant merchant or merchants, and all necessary documents being produced, the Registrar and merchants are to hear the matters in dispute discussed by the proctors and the parties principal, or their agents. The Registrar is afterwards to draw up the result of the investigation, and of their joint deliberation thereon, in a written report, to be brought into Court, and a minute to that effect is to be thereupon made in the Assignation Book.

The Judge is to direct the report to be confirmed, unless objected to by either party by the succeeding adjourned Court-day, or within a time to be limited by him. The report may be confirmed at the prayer of either of the proctors, and either may object to the report wholly or in part; but the party objecting must so declare in act of Court, and is to be assigned by the Judge to deliver in an act on petition, setting forth his objections to the adverse proctor, within a time to be limited. And the subsequent proceedings are then to be conducted as on all other acts on petition.

§ 31. *Taxation of Costs.*

The proctor of the party who has obtained a decree or order condemning another party in the costs, is to furnish the adverse proctor and the Registrar each with a copy of his bill, and to attend the Registrar to procure an appointment to tax the same, of which notice is to be given to the adverse proctor, that he may be present thereat; and if he shall decline, or neglect to attend, the taxation may proceed in his absence upon an affidavit being exhibited to and filed with the Registrar, shewing that a copy of the bill had been furnished, and that twenty-four hours' previous notice of the appointment had been given to him.

If the amount of the costs ascertained by the Registrar be not forthwith paid, the Registrar is to report the amount to the Court, when, if no objection be made, the Judge is to sign the bill, which completes the taxation, and a minute thereof is to be entered in the Assignation Book.

If the adverse proctor be dissatisfied with the amount proposed to be allowed, he is, on the same being reported and before the bill is signed by the Judge, so to declare in Court; and in that case the Judge is to assign him to deliver an act on petition in objection to the taxation within a short time to be specified, and subsequently the same course is to be pursued as in other acts on petition.

When the Judge has signed the bill, whether as originally reported by the Registrar, or with any subsequent alteration, he is to decree a monition for payment thereof: and if the costs be not immediately paid, such monition may be extracted and served as usual, and may be followed up by attachment if necessary.

§ 32. *Incidental Monitions.*

In any cause, however commenced, monitions may incidentally become necessary, which are to be made returnable at a period to be fixed by the Judge; and if the tenor of the monition be not complied with, the Judge, on proof that it has been duly served, may enforce obedience thereto by attachment.

§ 33. *Commissions.*

Commissions to take bail, to take the answers of parties to a libel or allegation, to take the oaths of parties or others to affidavits, to examine witnesses, and the like, may, under the authority, and at the discretion of the Judge, issue in cases where the parties reside at so great a distance that the transaction of the business by commission will be attended with less expense than their personal appearance before the Court.

Commissions may also issue for the unlivery of a cargo, for the appraisement or sale of a ship or cargo, or for the appraisement and sale of a ship and cargo in cases when, by reason of the distance, the Marshal cannot be conveniently employed for the purpose without great expense.

All commissions are to be directed to respectable merchants, or professional men named by the proctors; and when they can agree thereto, one Commissioner will be sufficient, otherwise a Commissioner is to be nominated by each party.

§ 34. *Acts on Petition.*

In cases where any incidental matter may become the subject of dispute, and either of the parties shall desire it, or if the Judge shall deem it necessary for his own

satisfaction to have the facts further elucidated, he may direct the circumstances to be set forth in an act on petition.

§ 35. *Appeals.*

All appeals from decrees of the Vice-Admiralty Courts are to be asserted by a party in the suit within fifteen days after the date of the decree, which is to be done by the proctor declaring the same in Court; and a minute thereof is to be entered in the Assignation Book. And the party must also give bail within fifteen days from the assertion of the appeal in the sum of 100*l.* sterling to answer the costs of such appeal.

In all cases, however, in which an appeal is asserted, except respecting slaves, the Judge may proceed to carry his sentence into execution, provided the party in whose favour the decree has been made give bail to abide the event of the appeal, by two sureties in the amount of the value of the property or subject in dispute, together with the further sum of 100*l.* sterling to answer costs, in the event of the same being awarded by the superior Court.

The party appealing, having complied with these regulations, is then to cause the Judge and Registrar to be served with an inhibition from the High Court of Admiralty, restraining them from further proceeding in the cause, and also with a monition to transmit the process.

This process will consist of a fair copy of the proceedings under the seal of the Vice-Admiralty Court, to be made and signed by the Registrar, at the expense of the party ordering the same, which is to be transmitted to the superior Court pursuant to the monition.

The proceeds, if in Court, or in the hands of any individual, must, on a special monition for that purpose being served, be remitted to the Registrar of the High Court of Admiralty or Court of Appeal.

§ 36. *Regulations as to the Sittings of the Court.*

Before the rising of the Court, the Judge is always to adjourn the same to a day to be by him fixed at his discretion, and proclamation thereof is thereupon to be made in open Court by the Marshal or officer of the Court. It is, however, competent to the Judge, notwithstanding such adjournment, subsequently to appoint an intermediate day or days, as may appear to him to be necessary, for the expediting any particular cause or causes before the Court.

Forty-eight hours' notice of such intermediate court-days must always be published in the Gazette or public newspaper of the colony by the Registrar, at the expense of the party at whose instance or for whose benefit the Court is to be so called, which expense is to be paid by the proctor.

Care is always to be taken that on such intermediate court-days, no assignation be sped, or order made, precluding the right, or to the manifest injury of any absent party, when it shall appear that he cannot have received sufficient notice of the sitting of the Court; and absent parties are always to be entitled to the favourable consideration of the Judge, if on the next succeeding regularly adjourned court-day cause shall be shown why an assignation made on any intermediate court-day had not been complied with.

In like manner, when an assignation has been made for an act to be done by a limited time, shall not have been duly complied with, and an intermediate court-day shall be subsequently held, parties who cannot by possibility have been cognizant of such intermediate Court, and who may have very conclusive reasons to allege why they have been unable to comply with such assignation, are not to be prejudiced by the enforcement of the same on such intermediate court-day.

§ 37. *As to the Return and Service of Warrants, Monitions, and other Instruments.*

In general cases, warrants, monitions, and other instruments are to be made returnable, and parties cited to appear at the Registry, either on a certain day mentioned, or at the expiration of a certain number of days after service, to be specified in the instrument, and between any two hours of the day most usually appropriated to public business.

Monitions to pay costs or a sum of money, or to do any specific act within a certain number of days, are to be returnable at the expiration of the usual hours of business at the Registry, on the furthest or last day assigned to the party to do the act.

If no appearance be given thereto, the Registrar is immediately on the expiration of the time specified to attend before the Judge or Surrogate in Court or Chambers, with the proctor who is to return the instrument; and the proceedings are subsequently to be continued according to the requisites of the cause. The day of such return is the period from which is to be reckoned, for all future purposes, the contumacy or default of the party cited and not appearing.

Instruments against all persons in general, and which are served only on the ship or goods, or on the Exchange, or principal resort of merchants, or on the Court-house, can only be further proceeded on *in pœnam* on the regularly adjourned court-days. But an instrument which has been personally served and duly returned. may be followed up by all further proceedings, even to attachment, without more regard to the regularly adjourned court-days than would be necessary respecting any other incident in the proceedings, because in such cases the party who has been served must always be aware of the

liabilities to which he is exposed by his own laches, or contempt.

If an instrument be served on a ship, or goods laden on board a ship, when the master is on board, and the action be one to which he ought to appear and become a defendant, such service may, for the purpose of future proceedings, be considered equivalent to a personal service on him.

Wherever any monition or other instrument is served by any other person than the Marshal, the certificate of the service thereof must be verified by an affidavit of the person serving the same.

All warrants, monitions, and other instruments requiring ulterior proceeding *in pœnam*, in case of no appearance or of non-obedience, must be duly returned at the time specified for their return; and if not then duly returned, no further proceedings can be had thereon.

§ 38. *Interlocutory Decree.*

The interlocutory decree, which must always be moved by counsel, is the final act of adjudication in the principal cause of action in any suit. But in some few instances a suit may be terminated without it, viz:—

Where a libel is rejected.

Where a defendant is dismissed because the promoter does not bring in his libel.

Where a protest is pronounced for, and the party appearing under protest is dismissed.

Where an action is subducted.

If sureties apply to be dismissed from their recognizances, it must be done by interlocutory decree; but if they are dismissed by the interlocutory decree in the principal cause, no further decree of that kind is necessary for their dismissal.

The fees due to the Judge and officers on an inter-

locutory decree, are chargeable to all parties who receive benefit under the same; thus, in a case of derelict, the fees are chargeable to the claimant who obtains restitution of the property, and to the salvors to whom salvage may be awarded.

No decree is to be made, nor act of Court to be sped by the Judge or Surrogate, without the presence of the Registrar, by whom a minute or record thereof must be made and attested, except only in case of the Registrar's unavoidable absence, on which occasion the Judge or Surrogate may assume an actuary to attest *pro hac vice* the act to be done. Any practitioner of the Court, provided he be not concerned in the suit in which the act is to be done, may perform this part of the Registrar's duty, attesting by his signature the entry of the act in the Assignation Book.

§ 39. *Monitions.*

If a monition be not decreed at the time an interlocutory decree is made, it may, at the petition of the proctor on either side, be decreed on any court-day afterwards.

No monition to pay costs can be extracted until after such costs shall have been regularly taxed by the Court.

§ 40. *Proxies.*

Although proxies are not usually exhibited in maritime suits, yet they may sometimes be required in order to prevent proctors from proceeding in causes on instructions from parties not being themselves entitled to intervene, or not having a legal *personæ standi* to prosecute a cause.

§ 41. *Other General Rules.*

Upon the execution of commissions to take bail, the sureties must always justify their sufficiency before the Commissioners, by being sworn to an affidavit, to be drawn by the Registrar and annexed to the commission; and when bail is not taken by commission, and the Court orders the sureties to justify, a similar affidavit must be made.

When a cargo has been delivered to the consignee, and he has not paid the freight, or when freight has been paid, and is in the possession of the owner of the ship, master, broker, or any other person, such freight may be arrested by service of a warrant, upon the consignee or the person in whose hands the freight remains.

The same course is to be pursued when, under similar circumstances, a monition is to be served to bring the freight into the Registry.

All commissions of unlivery, of appraisement, and of appraisement and sale, are to be extracted by the proctor for the plaintiff or promoter in the cause.

In those Courts in which it may be necessary that the same individual should act as advocate and proctor, he may elect in which of the two capacities his fee, in those instances where the duties are necessarily exercised together, shall be charged, and the practitioner is in no instance to be allowed to receive fees for the same business in both capacities, nor to take a fee as counsel where the act of a proctor only is necessary. The same rule will apply to the fee specified in the table for a consultation in any intermediate stage of the proceeding, should a "necessity arise to resort to counsel for advice;" but an advocate's fee for consultation is not to be charged on any occasion where a reference to counsel would not have been necessary. The practitioner in such cases is only to be entitled to the fee for consultation as a proctor.

If the practitioner charges the advocate's fee for motion necessarily made by counsel before the Judge in the progress of the cause, he is not to charge or be allowed the proctor's fee for attending such motion, and where he charges the advocate's fee "for the hearing," he is not also to charge or be allowed the proctor's fee "for attending informations on the final hearing;" nor is he in any case, when acting as counsel in the cause, to charge the proctor's fee for attendance to fee counsel.

In the case of the charges for drawing, and the fee for settling any plea, affidavit, interrogatories, answers, and the like, the practitioner acting in both capacities is not to be entitled to the full fee for drawing, and to charge a copy to settle, and also a fee for settling the same; but may be allowed, instead thereof, to charge such fee as the table prescribes for the advocate on settling, and also a moiety of the charges allowed by the table to the proctor for drawing and copying.

It being provided by the 5th section of the Act, under the authority of which these regulations are established, that persons feeling themselves aggrieved by the allowance of any charges made by any officers or practitioners in the said Vice-Admiralty Courts, as not warranted by the established tables of fees, may have such charges re-taxed by the authority of the High Court of Admiralty of England, upon summary application thereto.

It is requisite when such applications are intended to be made to that Court, that a set of the copies of all papers previously made out and used in the proceedings upon which the charges objected to have arisen, or so many of them as may be necessary to explain or support the disputed charges, be transmitted to England; or if such copies cannot be transmitted without incurring an expense disproportionate to the object, it will be sufficient, as a substitute for the same, that an affidavit be made stating summarily the nature of the proceedings and the

decree in the cause, a description of the different papers and the number of folios contained in each of them, and such facts or circumstances as will explain the nature of the cause and the charges objected to; which affidavit is to be filed in the Registry of the Vice-Admiralty Court, to give the officer or practitioner whose charges may be objected to, an opportunity of replying thereto, which he should do within a period not exceeding fourteen days, to be limited by the Judge, who is then to order the costs already taxed to be referred for revision to the High Court of Admiralty, with copies of the affidavits. But, previous to any such order of reference being made, the party complaining must pay to the adverse proctor such part of the allowed charges as is not objected to, and must bring the remainder into the Registry of the Vice-Admiralty Court, to abide the decision of the High Court of Admiralty.

NOTE.—*The foregoing Rules and Regulations touching the practice and proceedings in the several Courts of Vice-Admiralty Abroad, are extracted from a Report addressed to the Lords Commissioners of His Majesty's Treasury, drawn up and signed by*

JAMES FARQUHAR,
H. B. SWABEY,
WILLIAM ROTHERY,

and perused and approved by

HERBERT JENNER,
JOHN DODSON,
STEPHEN LUSHINGTON,

And the whole, together with the Table of Fees for the respective Colonies (regulated and approved by the same persons,) were submitted to and approved by the Right Honorable Sir CHRISTOPHER ROBINSON, *Judge of the High Court of Admiralty.*

SUPPLEMENTARY RULES

Established by the Queen's Order in Council, dated at the Court at Buckingham Palace, the second day of March, 1848.

The rules and regulations established by the King's Order in Council of the 27th June, 1832, are not to be construed to have set aside the former practice of the Courts of Vice-Admiralty, of allowing the defendant to require from the promoter to libel with sureties, unless the promoter should be admitted by the Court to his juratory caution.

From the shortness of the season of the navigation at the port of Quebec, and the danger and risk to ships towards the close of the navigation in the autumn, from even so short as twenty-four hours' notice of bail, to answer an action, the period of notice of bail as provided by the 11th section of the above rules and regulations, shall not be required where the parties who are proposed as the bail make oath that they are respectively worth more than the amount for which they are proposed as bail or security, over and above the amount of all their just debts.

J. DODSON,
JOSEPH PHILLIMORE.
WM. ROTHERY.
H. B. SWABEY.

CASES IN THE VICE-ADMIRALTY COURT FOR LOWER CANADA.

Tuesday, 18*th October*, 1836.

AGNES—TAYLOR.

Defence grounded on a *res judicata* must be specially pleaded; so also must misconduct, with proper specification of the acts thereof. Court may exercise a legal discretion as to costs. Costs refused in this case.

This was a cause of subtraction of wages brought by the mate of the vessel. The facts of the case are fully adverted to in the following opinion of the Court.

JUDGMENT.—*Hon. Henry Black.*

The present suit is brought by the promoter, as mate of the schooner Agnes, for a balance of wages, amounting to 110*l.* currency, calculated from the 5th June, 1834, to the 4th April, 1836, at 5*l.* per month, deducting 4*l.* for which the promoter gives credit as received in advance. A day having been assigned to the promoter to prove the contents of his libel, several witnesses were produced by him, and examined. Publication of the promoter's evidence was ordered by consent, without a responsive allegation being asserted on the part of the owners, who appear and defend the suit. From the evidence so taken on the part of the promoter, is established the fact of the service of the promoter, as mate on board of this vessel,

AGNEW. from the 5th of June to the 18th of October, 1834, on a voyage from Quebec to the West Indies, and thence down to the promoter's leaving the vessel on the last mentioned day at Malbay, in the District of Gaspé, on her return voyage to Quebec, the further prosecution of that voyage having been at Malbay abandoned by the owners. The only evidence of the rate of the promoter's wages, is to be found in the evidence of Mr. Le Moine, who says he believes that by the ship's articles the promoter was rated at 4*l.* per month. The voyage to Quebec appears to have been abandoned on the arrival of the vessel at Malbay. She appears to have been chartered by the owners on a voyage to Jersey, and to have taken on board part of her cargo, but did not proceed on this last voyage in consequence of the refusal of the collector to grant a permit. The owners file a protest, to show that the vessel had been wrecked at Malbay, to which protest the cross interrogatories of the owners apply.

The averments in the libel concerning the termination of the voyage at Malbay, and the cause of the promoter's leaving the vessel there, are by no means as clear and explicit as might have been desired, and I do not hesitate to say that if the case stood now upon the admission of the libel, I should have stopped the suit *in limine*, or ordered the libel to be reformed. But my predecessor having admitted this libel, I feel myself bound to give it the largest construction, so as to admit evidence of the circumstances which prevented the vessel from coming to Quebec, and which may be considered as having determined the promoter's contract. The chartering of the vessel at Malbay, for a new voyage soon after her arrival there,—the absence of any plea of desertion,—the length of time which has elapsed since the arrival of the vessel at Malbay,—the production of the protest by the owners, —and the breaking bulk at Malbay, and landing of the cargo, or a portion of it,—establish beyond controversy

that the voyage homeward ended at Malbay, and that the promoter was, therefore, justifiable in leaving the ship there. ADMR.

The claim of the promoter for wages from the time of his leaving the vessel down to the day of bringing this suit, is clearly not admissible. Under no circumstances could he claim more than compensation for the injury which he has sustained by his discharge: which compensation the Admiralty would in the proper case award in the shape of wages (*a*). There is, however, a total absence of evidence of the promoter's having suffered any damage by his discharge. We do not know how long he was kept out of employ, when he arrived at Quebec, nor how he has been employed in the intermediate time. Without information as to these facts, it is impossible for the Court to assess and award to him damages. If damage has really been suffered by this party in consequence of his discharge, evidence ought to have been offered thereof, and this Court cannot and ought not to supply it.

Then, as to the claim of the promoter for wages during the period of his actual service on board the vessel, that is, from the 5th June to the 18th October, 1834. This claim is resisted on the following grounds:—1. The insufficiency of the libel. 2. That the matter in controversy has been tried and determined, and the claim of the promoter rejected by a court of competent jurisdiction at Gaspé. 3. Gross and continued misconduct on the part of the promoter, during the time he was on board the ship, as detailed in the testimony of Mr. Le Moine. The first head of objection is already disposed of. On the second head, it is to be observed that the owners have not pleaded the judgment rendered in the Court at Gaspé as

(*a*) Abbott on Shipping, Part v., Ch. ii., s. 1, Story's Ed. 734; the Beaver, 3 Rob. 92; the Exeter, 2 Rob. 261; Emerson *v.* Howland, 1 Mason, R. 45; Parry *v.* The Peggy, 2 Browne's Adm. App. 533; Pothier, Louage des Matelots, No. 205.

AGNES.

a *res judicata*. The plea of *res judicata* stands upon the same footing as the plea of prescription. Neither operates an extinguishment of the action *ipso jure*, but may by exception. The defendant not pleading the one or the other waives it (*b*). Such is the rule of law, and that rule is consonant with equity and justice. If the exception *rei judicatæ* had been pleaded, the promoter might have seen fit not further to have prosecuted his suit; or might have replied, setting forth grounds of nullity in the proceedings and judgment; or that there was no such record: whereas, in the absence of such plea, and without notice of this ground of defence, he might be taken by surprise, and debarred of his just defence to the plea. Again, there is no averment in the proceedings to which this evidence applies, either as affirming or controverting it. I do not, therefore, think myself at liberty to enter into the consideration of the nature and validity of the proceedings at law in Gaspé. A like objection exists as to the remaining ground, the owners not having pleaded misconduct on the part of the promoter. He has had no opportunity, nor has he been called upon, to controvert the accusation of misconduct (*c*). If misconduct had existed, the owners not setting it up as a defence, it must be taken that it was pardoned (*d*). Besides, nothing is better established than that where misconduct on the part of the mariner is set up as a defence to a claim of wages, not only must it be pleaded, but the pleading containing such defence

(*b*) Dig. Lib. 44. Tit. 2, De exceptione rei judicatæ; 2 Browne's Civ. & Adm. Law, 362; Vinnius, Comment. Inst. Just. L. 4, T. 13, s. 5; Toullier, Droit Civil. Tom. 10, Liv. 3, Tit. 3, Ch. 6, sec. 3, art. 1 er. No. 74; Goubeau, Traité des Exceptions, p. 414.

(*c*) See judgment of Lord Stowell, in the case of the Exeter, 2 Rob. 261.

(*d*) Miller *v.* Brant, 2 Camp. 590; Laws of Wisbuy, Art. 25; Laws of Oleron, Art. 13. See also cases cited in Abbott on Shipping, Part II., Ch. 4, s. 3. In a suit for wages, service and good conduct are to be presumed till disproved. The Malta, 2 Hagg. 166.

must furnish a specification of the acts of misconduct, with a proper degree of certainty (*e*). AGENTS.

The services having been thus established, and no legitimate ground of defence shewn, I must award the promoter's wages during the period of that service. There is some difficulty as to the rate and quantum of wages. The promoter claims 5*l.* a month; Mr. Le Moine says, that to the best of his belief the sum in the articles was 4*l.* a month, and the credit for 4*l.* given in the promoter's account, would induce one to believe that this last was the true sum, as when advances are made to mariners at the inception of a voyage, the advance is usually of one month. The ship's articles are not produced by the owners, although they have been called upon to produce the ship's papers. The balance of wages claimed by the promoter at Gaspé, was 15*l.* 5*s.*, and I feel myself authorised to look at the record, merely as shewing what the promoter then stated his own claim at. Now, taking it as we must do, that the only sum received by him was 4*l.*, the rate of wages could not have been 5*l.* I shall therefore award him wages at the rate of 4*l.* per month, for the period of his actual service.

The only remaining question is as to costs. I must disclaim any discretionary power as to the awarding or refusing of costs, if by the term discrétion is understood any thing depending upon arbitrary will, and not upon the proper legal construction of the statute as applied to particular cases, to carry into effect the intention of the legislature. I understand that discretion which the Judge of the Admiralty is called upon here to exercise to be the discretion which *Sir Joseph Jekyll* describes in referring to the discretion which courts of equity are said to exercise (*f*). "Though proceedings in equity are said

(*e*) The Exeter, 2 Rob. 263; Macomber *v.* Thompson, 1 Sumner's Rep. C. C. U. S. for the first Circuit, p. 384.

(*f*) Cowper *v.* Cowper, 2 Peere Williams, Reports, p. 753.

AGNES. to be *secundem discretionem boni viri;* yet when it is asked, *Vir bonus est quis?* the answer is, *Qui consulta patrum, qui leges juraque servat* (*g*). And as it is said in Rook's case, 5, Rep. 99 b., that discretion is a science, not to act arbitrarily according to men's wills and private affections: so the discretion which is to be executed here, is to be governed by the rules of law and equity, which are not to oppose, but each in its turn to be subservient to the other; this discretion in some cases follows the law implicitly, in others assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the rigor of it; but in no case does it contradict, or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. This is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with." Now, in the exercise of the discretion thus described, I do not feel that I can award costs to the promoter. It does appear to me that the promoter might have had as effectual a remedy for the recovery of his wages by complaint to a Justice of the Peace under the provision of the Stat. 5 & 6 W. 4. c. 19, s. 15, as he could have here. The motives which rendered necessary the establishment of this summary tribunal for the trial of seamen's suits, apply with multiplied force to ships lying at the out ports, remote from the actual seat of this Court. I shall, therefore, certify accordingly (*h*).

Davidson, for promoter.

Aylwin, contra.

(*g*) Hor. Epist. l. 16, v. 41.

(*h*) See the case of The Brig William, 2 W. R. 231.

Saturday, 22nd October, 1836.

PHŒBE—RALTRAY.

The court has no jurisdiction in cases of suits for pilotage, where there has been a previous judgment of the Trinity House, upon the same cause of demand.

JUDGMENT.—*Hon. Henry Black.*

PHŒBE.

This is a case of the first impression. The libel sets forth a contract between the promoter, a pilot, and the former master of the ship Phœbe, attached in this suit, for the piloting of this vessel from Quebec to Bic in the month of November, 1835. It further sets forth that after the making of this contract, the promoter had gone on board and entered into the service of the ship, but that the master, without good or sufficient cause, dismissed him from the same and employed another pilot, whereby the promoter was prevented from piloting other ships, and became entitled to the sum of 20*l.* currency, being the amount of pilotage justly due for the piloting of a ship of the description of this vessel from Quebec to Bic. The libel then proceeds to allege the institution of a suit in the Trinity House at Quebec by the promoter against such former master of the Phœbe, for a breach of this contract, and the recovery in the Trinity House, on the 17th of the same month of November, of judgment for the sum of 10*l.* currency and costs (*a*). This is followed by an allegation that since the arrival of the vessel in the present season, Mr. Dean the consignee of the vessel for and on behalf of the owners, had promised to pay this sum of 10*l.*

(*a*) As to the jurisdiction of the Trinity House, see Provl. Stat. 45, Geo. 3, c. 12, s. 18.

PHŒBE.

The case has been argued upon the motion on the part of the promoter for the admission of this libel, and the question is, whether the Court can entertain a suit *in rem* against a ship for services rendered to her by a promoter, as pilot, that promoter having previous to the institution of the suit in this Court, taken proceedings before the Trinity House for his pilotage, and having recovered judgment there for the same.

The jurisdiction of this Court in cases of pilotage is undoubted (*b*), and if the promoter had stopped at the end of the first article of his libel, the suit must have proceeded, leaving the defendant to plead the recovery in the Trinity House if he should see fit. But it appearing upon the face of the libel that such recovery has been had, the Court is called upon to determine whether the promoter is entitled to proceed in this Court and obtain a judgment therein anew upon the subject-matter of the judgment of the Trinity House or upon that judgment itself. I think the suit cannot be maintained. First: Not upon the original consideration of the pilotage; that original consideration is merged in the judgment of the Trinity House (*c*). A Court of competent jurisdiction having decided the facts set forth in this libel, which were directly in issue before the Trinity House, the party is estopped from trying those facts again (*d*). The rule of law is *nemo debet bis vexari pro eadem causa*. In this case the same allegations are made, and if the cause proceeded the same facts will be in issue as were in issue in the cause before the Trinity House (*e*).

(*b*) 2 Will. 4, c. 51, s. 6; the Nelson, 6 Rob. 227.

(*c*) Sparry's case, 5 Rep. 61; Ferrers's case, 6 Rep. 7, Cro. Eliz. 668. Hitchin *v.* Campbell, 2 Bl. 779, 831.

(*d*) Buller's Nisi Prius, 244; Blackham's case, 1 Salk. 290; Rex *v.* Grundon, Cowp. 315; 1 Saund. 98; Com. Dig. "Action," (I).

(*e*) Putt *v.* Royston, 2 Show. 211.

PHŒBE.

To allow two several suits for the same cause of action in two several Courts, would lead to a worse than useless multiplication of law suits, would be highly vexatious to parties, and would subject Courts to discredit from contrariety of co-existing decisions of equal authority in separate tribunals upon the same matters (*f*). "Opposite judgments would indeed be inextricable, as being flatly inconsistent; one of the Courts, for example, ordering a thing to be done, and the other Court discharging it to be done." Litispendence on these grounds is held a good plea to an action (*g*). The party had his option to proceed for his pilotage either before the Trinity House, or before the Admiralty. He has made his option of the former, and by that he must abide as well in respect of the execution of the judgment, as in the obtaining of it.

Next as to the ground of action set forth in the second article of the libel founded upon the judgment in the Trinity House. If it be true that the original cause of action is merged in the judgment, and of this I apprehend there can be little doubt, then the inquiry comes simply to be, whether the Court of Admiralty can entertain an action founded upon the judgment of a particular Court, having concurrent jurisdiction with it, as to the subject-matter of such judgment; and whether such judgment can be made the foundation of proceedings *in rem*, in the Admiralty. No trace is, I believe, to be found of a suit founded upon the judgment of a domestic tribunal being brought or maintained in the Admiralty. If such a suit could be entertained, it must be founded on the judgment itself as a title or a security for money, which having none of the characters of a maritime contract, could not be tried or enforced in the Admiralty. In the

(*f*) Harg. Law Tracts, 447; 6 Rep. 9.

(*g*) Sparry's case, 5 Rep. 61.

PHOEBE. case of the Picimento, (*h*) execution was granted in the High Court of Admiralty, to enforce the judgment of a Vice-Admiralty Court, which had been abolished previously to the final execution of its sentence. But here the promoter can still obtain from the Trinity House, every remedy by way of execution, that he could at any time have had from that Court. If a judgment of the Trinity House could found proceedings *in rem* in the Admiralty, this Court would become subordinate and ancillary to the Trinity House, for the purpose of carrying into effect the judgments of that Court, which cannot be. The law in giving jurisdiction to the Trinity House, settled also the nature of the execution by which the judgment of that Court was to be enforced: and the party in making his option in that Court, made option at the same time of the remedy by execution to be had there. If the proceeding here could be maintained, the promoter would have the remedy by execution in the Trinity House; and that by attachment in the first instance, and execution afterwards of the ship *cumulative*: which remedies by execution might proceed concurrently in different forms, and against different subjects, out of two different Courts, altogether independent of each other, which might lead to great oppression and inconvenience (*i*).

Lastly. The promoter sets forth a promise on the part of the consignee of the ship to pay the amount of this judgment. Now, this is a personal promise by one not capable of binding the ship, made upon land for the payment of a debt of a third person. If this promise could be made the subject of any action, it could only have been of a personal action in the common law courts. But I presume that this last allegation is not set

(*h*) 4 Rob. 360.
(*i*) See La Madonna della Lettera, 2 Hagg. 289.

forth as a substantive ground of action, but as a fact in corroboration of the previously alleged causes of action. The libel is therefore rejected. PHOEBE.

For Promoter, *Aylwin.*

Gairdner, contra.

In *Moses* v. *Macferlan* (2 Burr. 1005), Lord Mansfield said, "the merits of a judgment can never be over-haled by an original suit, either at law or in equity. Till the judgment is set aside or reversed, it is *conclusive*, as to the subject matter of it, to all intents and purposes."

Wednesday, 26th October, 1836.

JOHN AND MARY—MARSHALL.

Since the passing of the Act of the Imperial Parliament, 2 Will. 4, c. 51, the establishment of fees, in the Vice Admiralty Court here, is exclusively in the king in council; and the table of fees established under this statute having been revoked, without making another, it is not competent to the Court to award a *quantum meruit* to its officers.

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Soon after the promulgation in Lower Canada, of the order in council of the 27th June, 1832, framed under the Act of the Imperial Parliament, 2 Will. 4, c. 51, considerable difficulty was manifested at the table of fees established by it in the Vice-Admiralty Court at Quebec. After a careful inquiry into the grounds of this discontent, Lord Glenelg, the Secretary of State for the Colonial Department, recommended to the Lords Commissioners of the Treasury, the revocation of that order, in so far as related to the establishment of a table of fees in the Vice-Admiralty Court at Quebec. This was effected by an order in council, dated the 20th of November, 1835, which was proclaimed in Lower Canada, on the 4th of February, 1836. It had been Lord Glenelg's understanding that the revocation of the order of the 27th of June, 1832, would revive the system previously existing. It appeared, however, that the acting Judge of the Vice-Admiralty Court took a different view of the case, and on the revocation of the order of the 27th of June, 1832, established a scale of fees for the officers of the Court, on a principle of equitable remuneration for services performed. This arrangement continued in force until the 21st of September, 1836, when on the appointment

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of another judge, it was abandoned; and from that time no regular remuneration existed for the officers. The question in this case was, whether the table of fees established by the order in council of the 27th June, 1832, having been revoked and annulled by the order in council of the 20th of November, 1835, without substituting any new table of fees in lieu of the one so annulled, the Court could allow what might be considered reasonable fees for services performed by the officers. The opinion of the Court, after hearing counsel, was as follows:

JUDGMENT.—*Hon. Henry Black.*

The case now before the Court, inconsiderable as is the amount to which it relates, involves a question of very great magnitude, being whether the table of fees to be allowed to the officers of the Court of Vice-Admiralty in Lower Canada, established under the authority of the Act of the Imperial Parliament, to regulate the practice and the fees of the Vice-Admiralty Courts abroad, and to obviate doubts as to their jurisdiction (*a*), having been revoked and annulled by an order of the King in Council of the 20th of November, 1835, without substituting any new table of fees in the place of that so annulled, under this Act, it is competent to the Court to allow what may be considered reasonable fees by the Court, for the labour and attendance of the officers thereof. Since the revocation of this table of fees, and during the present season, my predecessor has allowed fees to the officers of the Court for their labour and attendance as a *quantum meruit, pro opere et labore.* I should have been glad to find that the Court had the power to make an allowance of this nature to its officers, for it would certainly be a great hardship that they should be obliged to give their time, skill, and labour without being entitled to demand a compensation therefor; but after the most careful and

(*a*) 2 Will. 4, c. 51.

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anxious investigation of the subject that I have been able to make, I am led to the conclusion that the Court has not the power to sanction such allowance (*b*). By the ancient law of England, none having any office concerning the administration of justice could take any fee or reward for the doing of his office but of the King (*c*); and the general rule is that they cannot take any more for doing their office than has been allowed to them by Act of Parliament or by immemorial usage. This principle relative to fees is but a consequence of the more general rule, *Nullum tallagium vel auxilium, per nos vel per hæredes nostros, in regno nostro, ponatur seu levetur, sine voluntate et assensu, archiepiscoporum, episcoporum, comitum, baronum, militum, burgensium et aliorum liberorum communium de regno nostro* (*d*), and is so considered by my Lord Coke, who says that within this Act are new offices erected with new fees, or old offices with new fees, for that is a tallage put upon the subject, which cannot be done without the common assent by Act of Parliament (*e*). It is, however, said by *Hawkins* that it cannot be intended to be the meaning of the statute to restrain the courts of justice, in whose integrity the law always reposes the highest confidence, from allowing reasonable fees for the labour and attendance of their officers; for, the chief danger of oppression, he adds, is from officers being left at their liberty to set their own rates on their labour, and make their own demands; but there cannot be so much fear of these abuses while they are restrained to known and stated fees, settled by the discretion of the Courts, which will not suffer them to be exceeded without the highest resentment (*f*). Without here examining minutely this

(*b*) See the Sentence of Dr. Croke in the case of the Hiram, Stewart's Vice-Admiralty Rep. 587.

(*c*) St. W. 1; 26 Co. Litt. 368; 2 Inst. 176, 208, 209.

(*d*) St. 34 Ed. I.

(*e*) 2 Inst. 533.

(*f*) Hawkins's Pleas of the Crown, B. 1, ch. 68, s. 3.

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authority from *Hawkins*, I may say that if there had been no statutory provision whatever relating to fees in the Vice-Admiralty Court here, I should have considered whether I might have allowed reasonable fees to the officers in the nature of a *quantum meruit*. But, since the passing of the before-mentioned statute, I do not conceive that such power belongs to any of the Vice-Admiralty Courts. The power of establishing tables of fees seems to me to be wholly and exclusively vested in the King in Council. By the first section it is provided that it shall be lawful for His Majesty, with the advice of His Privy Council, from time to time, to make, ordain, and establish tables of fees to be taken and received by the judges, officers, and practitioners in the said Courts, for all acts to be done therein; and also from time to time, as shall be found expedient, to alter any such fees, and to make any new table or tables of fees; and by the third section, "that the several fees so to be established, and no other, shall from and after the making and establishment thereof, and the entry and enrolment thereof, as aforesaid, be deemed and taken to be the lawful fees of the several judges, officers, ministers, and practitioners of the said respective Courts, and such fees only shall and may be demanded, received and taken accordingly." It is to be observed that in the year 1809, the Provincial Ordinance, 20 Geo. 3, c. 3, regulating the fees of the Courts generally, and amongst them of the Court of Vice-Admiralty, having long expired, the then judge of the Court of Vice-Admiralty established of his own authority a table of fees regulating as well his own fees as those of the officers of the Court. The legality of this table having been questioned, and complaints made of the fees established therein as unreasonably large, the statute in question was passed, whereby the intention of the Imperial Legislature appears to have been to prevent the recurrence of similar inconveniences, by vesting the

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power of regulating the fees in His Majesty, with the advice of His Privy Council. The object of the statute would, it seems to me, be entirely frustrated, if this Court were to intermeddle by giving a *quantum meruit* to the officers of the Court for particular services rendered by them in their offices. Fees settled as a *quantum meruit* by the Court are as much fees as those established by statute, and fall, therefore, within the above prohibition. All fees of office, properly so called, are presumed to have a legitimate foundation in some act of a competent authority, originally assigning a fair *quantum meruit* for the particular service (*g*). Where the fee is established by or under the authority of an Act of Parliament, the statute is conclusive as to the *quantum meruit*. Where settled by the authority of the Court, the subject is not concluded thereby, but may try the reasonableness of the sum claimed as a *quantum meruit* before a court of competent jurisdiction (*h*), and obtain the verdict of a jury thereon, when, and when alone, they become established fees (*i*). If then this Court were to assign what it might consider a reasonable *quantum meruit* to the promoter here, as and for costs of contumacy to be paid to his proctor, and to the officers of the Court for their services in this cause, the amount of these costs would be fees, not established under the authority of the foregoing Act, and would fall directly within the prohibition contained in the third section of that Act; and if the Court could exercise such a power in this particular case, it would be called upon to exercise a like power in respect of every service performed by the several officers of this Court in the ordinary discharge of their several duties. Out of which would grow a table of the usual fees of the Court,

(*g*) See opinion of Lord Stowell in the case of the Rendsberg, 6 Rob. 145.

(*h*) Viner, Abr. Fees, E. 4, 5, and by Holt, C. J., 12 Mod. 609.

(*i*) Gifford's case, 1 Salk. 333, Hardr. 351.

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not virtually distinguishable from a table of fees to be taken and received by the officers and practitioners of the Court for all acts to be done therein, established by the authority of the Court, *uno flatu*, which would be, in the view I take of the subject, an usurpation of a power which the Imperial Legislature has vested in His Majesty, to be exercised with the advice of His Privy Council; and might, besides, have the effect of introducing anew all those inconveniences which it was the object of this provision of the statute to remedy. In coming to this conclusion, the feelings which it would otherwise produce are mitigated by the consideration that the officers of the Court have a claim for relief upon the justice of His Majesty's government, which cannot fail to receive every proper attention (*k*).

(*k*) Salaries were accordingly assigned to the officers, to be computed from the 21st of September, 1836.

The question as to the effect of the order in council, of the 20th November, 1835, on the system under which the officers of the Court were remunerated, was afterwards submitted by the Secretary of State for the Colonial Department to the law officers of the Crown in England (now Lord Chief Justice and Lord High Chancellor), whose opinion, given 17 May, 1837, was as follows:

"We are of opinion that the Judge of the Vice-Admiralty Court is not invested with authority to establish such a table of fees.

"J. CAMPBELL,
"R. M. ROLFE."

Thursday, 27th October, 1836.

NEWHAM—ROBSON.

NEWHAM. **Practice. The Court will require the libel to be produced at a short day, if the late period of the season, or other cause renders it necessary.**

Per Curiam.

This case turns entirely upon a question of practice, but a question involving important consequences, and to which I have accordingly given my particular attention. It is of the last degree of consequence, that in seamen's suits the least delay should be incurred that is consistent with the due and proper examination and adjudication of them (*a*). The rules and regulations made by His Majesty in Council for the guidance of this Court (*b*), seem to me consistent with all proper expedition in the conduct of seamen's suits. Under these regulations, the action having commenced by an entry in the Action Book (*c*), it is competent for the master voluntarily to appear, with or without bail, the vessel in the last case remaining under arrest (*d*). The appearance entered, the defendant is entitled to an assignation on the plaintiff to exhibit a libel within a time to be limited by the Judge (*e*). In the

(*a*) All admiralty suits in the British courts are summary causes, and justice is administered *levato velo*. Clerke's Prax. Tit. 19; 2 Bro. Civ. & Ad. Law, 413.

Ubicunque litis causa conveniuntur, non diu detinendi sunt, nec longum litis sufflamen permittendum, sed quam brevi potest temporis spatio, causa maturanda ob navigandi necessitatem, cujus periculum est in mora. Cæsar, L. 1, Bel. Gal., *Res maritimæ celerem et instabilem motum habent*. Loccenius, Ins. Marit. Lib. 3. ch. 10, s. 2.

(*b*) 27 June, 1832.

(*c*) Rules and Regulations, § 7.

(*d*) Ibid. § 9.

(*e*) Ibid, § 12. See also Oughton's Ordo Judiciorum, Tit. 54, s. 2; Clerke, Praxis Supremæ Curiæ Admiralitatis, Tit. 11.

NEWHAM.

exercise of a legal discretion, and considering the season of the year, the Court in this case, on the 25th instant, assigned the following day at eleven o'clock, for the plaintiff to exhibit his libel. The simplicity of seamen's suits generally, appears to the Court to be such as to render the time allotted sufficient; all that is required in the libel being to state the hiring, rate of wages, performance of the service, determination of the contract, and the refusal of payment (*f*). If the plaintiff, however, had any grounds to claim an extension of this time, and had made an application supported by affidavit, the Court might have extended the time (*g*). In the absence of such special ground, the Court cannot do otherwise than dismiss the defendant from this cause (*h*).

(*f*) Rules and Regulations, § 15.

(*g*) Oughton's Ordo Judiciorum, Tit. 55, s. 2.

(*h*) Ibid. Tit. 56, s. 2; Browne's Civ. and Adm. Law, 410; Rules and Regulations, § 38.

CLANSMAN,—SCOTT.

Per Curiam.

CLANSMAN.

This case being in the same situation as the last, the same judgment must be entered.

Wednesday, 2nd November, 1836.

FRIENDS—DUNCAN.

FRIENDS. An attachment awarded against a master for taking out of the jurisdiction of the Court his vessel, which had been regularly attached.

Per Curiam.

The master appears to have taken the vessel out of the jurisdiction of the Court, after she had been regularly attached on the 3rd of July last, which is a direct contempt against the authority of the Court (*a*). In a case like the present one, if the Court had not the power of vindicating its authority, its process would become nugatory, and its jurisdiction annihilated. The party is therefore entitled to a monition on the master to shew cause why an attachment should not issue for a contempt (*b*).

(*a*) Rigden *v.* Hedges, 1 Lord Raymond's Reports, p. 446; 1 C. Rob. 332; Enoch Stanwood's case, Stewart's Nova Scotia V. A. Rep. 123.

(*b*) Oughton, Ordo Judiciorum — De contemptu, Tit. xxx.; Tom. 1, p. 57; Clerke, Praxis Supremæ Curiæ Admiralitatis, Tit. 68, in fine.

FRIENDS—Duncan.

Practice. On return of a warrant, first default made, but no prayer for a second default at the expiration of the two months from the return of the warrant: proceeding discontinued thereby.

Per Curiam.

Upon the return of the warrant in this suit on the 5th of July last, the parties cited not appearing, an entry of the first default was made. It would have been competent to the promoter, at the expiration of two months from the return of the warrant, to have had the parties again pronounced in default (*a*), but the promoter does not appear to have prayed for a second default, at the time and in the manner prescribed by the regulations. If the Court could now grant a second default, it might do so for any indefinite period of time after the entry of the first default. It is true that it is said the master removed the ship out of the jurisdiction of the Court between the first default and the expiration of the two months, but this did not prevent the promoter from obtaining a second default; and it may be that the law gives a special remedy against the ship in consequence of the rescue (*b*). This, however, is not before the Court upon the present application; the sole question is, whether in the ordinary course of the practice of the Court, it is competent to the promoter to obtain the second default at any time he sees fit beyond the period of the two months fixed by the rules

(*a*) Rules and Regulations, § 10.

(*b*) If a ship be arrested by process out of the Admiralty Court, for a matter arising within their jurisdiction, though she be rescued at land, the conusance of the rescue belongs to the Admiralty, otherwise not. Per Holt, Chief Justice, 1 Lord Raymond's Rep. 446.

FARRINGS. and regulations. Under the old practice the certificate of the execution of the warrant was regularly continued to four successive defaults, with certain intervals between (*c*): by the new rules and regulations two of these are dispensed with, and the continuance is operated by the rules and regulations without a formal rule to that effect. It is, however, not less a continuance, and the party can only be cited, as it appears to me, on the day to which the cause is continued: *non constat* that he was not in attendance on that day, and not being cited he would have a right to consider the promoter did not intend to proceed to a *primum decretum*. I cannot, therefore, pronounce the parties cited in default.

(*c*) Clerke, Praxis Curiæ Adm. Tit. 31, 35; Browne's Civ. & Ad. Law, ii., 399.

Tuesday, 8th Nov. 1836.

CUMBERLAND—TICKLE.

CUMBERLAND.

COLLISION.—Owners of vessels are not exempted from their legal responsibility, notwithstanding that their vessel was under the care and management of a pilot.

Vessel giving a foul berth to another vessel, liable in damages for collision done to the vessel to which such foul berth was given by her, although the immediate cause of the collision was a *vis major*, and no unskilfulness or misconduct was imputable to the offending vessel after giving such foul berth.

This was a case of collision brought by the owners of the brig Cornwallis against the brig Cumberland. The libel pleaded that on the 5th of October last, the Cornwallis, a brig of 231 tons, arrived at the quarantine station at Grosse Isle, with a very heavy gale blowing from the eastward, and brought up at about half after ten in the forenoon, and cast her small bower anchor, and afterwards let go her best bower anchor; that the brig Cumberland arrived at the same quarantine ground between the hours of eleven and twelve of the same day, and let go her anchor right a head, and to the windward of the Cornwallis there being at the time much more than sufficient sea room on either side of the Cornwallis, for the anchoring of the Cumberland without danger to either vessel: that about ten minutes afterwards the Cumberland let go her second anchor, which brought her very near to the Cornwallis, the wind continuing to blow from the eastward, and gave a foul berth to the Cornwallis; that on the same day the Cumberland drove upon the Cornwallis, her anchor stock catching fast hold of the chain cable of the small bower anchor of the Cornwallis slipped up to her bows, came into collision with the

CUMBERLAND. Cornwallis, and passed her, was brought up by the anchor stock catching as above, and by the sudden jerk broke the large bower anchor chain cable of the Cornwallis, and did various other injuries to the Cornwallis specified in the libel; which collision and injury it was alleged proceeded from the inattention or want of skill of the persons on board of the Cumberland.

On the part of the owners of the Cumberland it was pleaded in their responsive plea, that she anchored at the quarantine station at Grosse Isle on the 5th of October, at about eleven in the afternoon, letting go the starboard bower anchor, and veering about forty fathoms chain, and then let go the larboard bower anchor veering out thirty fathoms, and paying out at the same time thirty fathoms more of the starboard anchor, then riding with the anchors down, the gale increasing in violence, shortly after sent down the top-gallant yards; that the Cumberland thus rode out that flood, the following ebb, and a part of the next flood till about half past ten of the clock in the afternoon, the gale then blowing a perfect hurricane, the starboard chain cable broke, and the strain then coming entirely on the larboard bower anchor, drew the fluke of that anchor straight, thereby rendering it useless, when the Cumberland was driven foul of the Cornwallis, and driving before the wind and tide, the stock or straightened fluke of the Cumberland's anchor came in contact with the Cornwallis's chain and slipped up to the bows of the Cornwallis. This was followed by an allegation that the collision did not occur through the inattention, neglect, or want of skill of the commander and crew of the Cumberland, but on the contrary, that the commander and crew thereof used every exertion in their power to prevent the said collision, and to protect the Cornwallis against all damage and loss.

The case was argued by Mr. Okill Stuart for the Cornwallis, and Mr. Duval, K. C., for the Cumberland.

JUDGMENT.—*Hon. Henry Black.* CUMBERLAND.

The facts do not appear to admit of doubt; indeed there is no essential difference between the material facts as stated by the parties in their several pleadings or by their witnesses. The Cornwallis being anchored at Grosse Isle, the Cumberland arrived at that station with a strong easterly wind and a flood tide, and anchored to the windward of the Cornwallis, at a distance of between sixty and seventy fathoms. These vessels rode out the remainder of the flood tide, the following ebb tide, and a portion of the next flood tide, the wind continuing to blow from the eastward, and increasing in violence. At the end of about ten hours from the anchoring of the Cumberland, at about half after ten in the night, the starboard chain cable of the Cumberland broke, and the whole stress of the ship coming upon the larboard anchor, straightened the fluke of it, and the Cumberland drove foul of the Cornwallis. The Cumberland driving before the wind and tide, the stock or fluke of her anchor hooked the Cornwallis's chain cable, ran up to the bows of the Cornwallis, and the collision complained of then took place. In cases of collision, the collision and damage may arise from the fault or misconduct of the vessel suffering from the collision: or the accident may have happened from unavoidable circumstances, without fault on the part of either vessel; or both parties may be to blame, as where there has been a want of skill or due diligence on both sides: or the loss and damage may be owing to the fault or misconduct of the vessel charged as the wrong doer. In the two first cases no action lies for the damage arising from the collision. In the third case the law apportions the loss between the parties as having been occasioned by the fault of both of them. In the present case, the question is whether there was fault or misconduct on the part of the Cumberland, and

CUMBERLAND. that question seems to depend upon whether, according to the rules and practice of navigation, the master of the Cumberland was justified, under all the circumstances, in bringing the Cumberland to anchor at the place and in the manner which he did, respect being had to the situation and anchorage occupied by the Cornwallis when the Cumberland was brought to anchor. If there were misconduct or want of proper care and prudence in the master of the Cumberland in anchoring that vessel in the place he did, and her being so moored caused the accident, then the Cumberland is answerable in damages for the collision, although it may have proceeded immediately from the irresistible violence of the wind and waves. For, if the collision be preceded by a fault, which is its principal or indirect cause, the offending vessel cannot claim exemption from liability on the ground of the damage proceeding from inevitable accident, the rule being *quando culpa præcessit casum tunc casus fortuitus non excusat.* But, if on the other hand there was no want of proper nautical skill and discretion in so anchoring this vessel, the collision must be considered as having arisen from a *vis major*, for which the Cumberland is not answerable. To enable the Court to come to a decision upon the case, it is necessary that a correct opinion should be formed upon the following questions, which are of a nautical character:—1. Whether, previous to and at the time of the occurrence of the accident, the Cumberland was properly moored and anchored, relation being had to the situation of the Cornwallis, and the state of the wind and tide, at the time when the Cumberland was so moored and anchored? 2. Whether the accident arose from unavoidable circumstances, without fault being attributable to either of the ships or their masters, or whether it proceeded from the fault of either of the said ships or their masters, and if so, from which of them? Availing myself of the power which this Court has to refer to some

gentleman conversant in nautical affairs, I have obtained the assistance of a captain in the Royal Navy, now engaged in an important public service here, upon whose judgment and opinion I shall feel it my duty to rely.

Captain BAYFIELD (*a*), who had examined the evidence and heard the arguments and observations of the counsel in the cause, then delivered the following written opinion: —Having deliberately weighed all the circumstances bearing upon this case as set forth in the evidence on either side, the following is my conscientious opinion thereon, and the grounds upon which it has been formed: —1. In answer to the first question submitted to me, or as having relation to it, I must remark, that since the Cumberland's anchors did not drag by reason of the badness of the anchoring ground, but, on the contrary, one cable parted and the other anchor became straightened, whilst the Cornwallis's single anchor and chain cable subsequently bore the strain of the vessels, there is strong reason to infer that the cables and anchors of the Cumberland were not sufficient, but they might have been imperfect unknown to the master or owners, since it does not appear in evidence that they were less than the established size for vessels of her tonnage. I am of opinion that the Cumberland did not give the Cornwallis what is technically termed "a foul berth," since it appears upon evidence that she was so anchored as to allow sufficient room for the vessels to swing clear of each other. But, on the other hand, I am of opinion, and I believe it to be a generally received opinion among seamen, that it is imprudent and improper to anchor directly a-head or directly astern of another vessel, in the direction of the tides or prevailing winds, unless at such or so great a distance as would allow time for either vessel to take measures to avoid collision in the event of

(*a*) Now Rear Admiral Bayfield.

CUMBERLAND. either driving from their anchors. It is, moreover, the usual practice not to anchor near to and directly in another vessel's hawse, that is, directly a-head and in the direction of the wind and tide, as the Cumberland did in relation to the Cornwallis, and in books which treat on seamanship it is mentioned as a thing to be avoided, not only to prevent accidents from driving in bad weather, but also in order that either vessel may be able to get under weigh without risk of collision with the other. Now, at Grosse Isle, there are no winds which could endanger a vessel excepting those which blow directly up or directly down the river, in or very nearly in the direction of the tides, and these are well known to be prevailing winds. I therefore consider that it would have been wrong to anchor the Cumberland in the position which she occupied in relation to the Cornwallis at any time; but under the circumstances in which the Cumberland anchored, at or near the commencement of an easterly gale, in the month of October, I conceive it to have been highly incautious and imprudent in the pilot of that vessel to have anchored her in the position which he did previously to the collision; and in so far as there was not due precaution and prudence exercised by the pilot, I conceive that the Cumberland was not properly moored and anchored. 2. In answer to the second question, That the Cumberland was anchored directly a-head of the Cornwallis in the direction of a strong wind and flood tide, and so near as not to allow of time for any measure to be taken to avoid collision in the event of her driving or parting from her anchors, either on her own part or that of the Cornwallis, is, I think, fully substantiated by the evidence. That she was anchored, as alleged, directly a-head, and in the direction of the wind and tide, is moreover proved by the circumstance of her anchor hooking the chain cable which the Cornwallis was riding by. I do not, therefore, think that the accident

arose from unavoidable circumstances, since a common degree of prudent precaution, on the part of the pilot of the Cumberland, would have prevented its occurrence. The master of the Cumberland appears in evidence to have admitted that it was improper to have anchored where he did, and to have told the pilot to anchor further out. How far the master of the Cumberland is legally answerable for the acts of the pilot, or whether he be answerable at all, it is not for me to decide, but as it is generally considered that the pilot has the sole charge of the vessel, and that the master cannot take the charge out of his hands without risking the insurance, I am of opinion that the fault is imputable to the pilot of the Cumberland alone. CUMBERLAND.

The COURT.—Captain Bayfield exempts the master from blame, and attributes the fault which gave occasion to the damage to the pilot; but, so far as the present suit is concerned, it is immaterial whether the fault be with the master or with the pilot. It is settled law that when collision takes place in consequence of the fault of the pilot, the ship doing the wrong is not the less answerable for the collision. I esteem myself particularly fortunate in having had such assistance upon the present occasion, and adopting the opinion of Captain Bayfield, I decree in favour of the Cornwallis, and assess the damages at 68*l.* 12*s.* 9*d.*

NOTE.—Upon Captain Bayfield's making his report, and it being read in the presence of the counsel, the Court observed to Mr. Duval, the counsel for the Cumberland, that it appeared from Captain Bayfield that the damage had arisen, not from the fault of the master, but from that of the pilot, and asked him whether he wished to be heard upon that point. The counsel for the Cornwallis (Mr. Stuart), referring to the case of the Neptune the

CUMBERLAND. Second (*a*), the counsel for the Cumberland said that he acquiesced in the law of that case, and admitted that the ship was answerable for the act of the pilot, upon which judgment was given accordingly. The case of the Neptune the Second occurred shortly after the passing of the Statute 52 Geo. 3, c. 39, and the judgment of Lord *Stowell* appears to have been founded upon the ancient law, as it originally stood unaltered by any legislative enactment. The 6 Geo. 4, c. 125, repealing the statute 52 Geo. 3, c. 39,—which was also a consolidating Act, and contained some general provisions,—exempts the owners from all liability for loss or damage arising from the neglect, default, incompetency, or incapacity of the pilot. The words of the Act 6 Geo. 4, c. 125, s. 55, are these: "No owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever from, or by reason or means of, any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of this Act." It makes it obligatory upon the master in all cases to take a pilot, and subjects him to a certain penalty in default of doing so. The provincial statute 45 Geo. 3, c. 12, s. 13, provides "that if the master of any ship or vessel coming to the harbour of Quebec, not having on board a branch pilot, shall refuse to receive on board and employ any branch pilot who shall offer to go on board and serve as such, in the river St. Lawrence, the master of such vessel shall pay to such branch pilot, who shall have so offered himself, half pilotage to the harbour of Quebec, from the place at which such pilot shall have so offered." This is the only clause in the provincial statute, relating to the duty of the master as to receiving a pilot, and it

(*a*) 1 Dods. Adm. Rep. 467.

contains no clause similar to that of the 55th section of the English Pilotage Act, 6 Geo. 4, c. 125, or of the 30th sect. of the repealed Act, 52 Geo. 3, c. 39. In the case of Fletcher *v.* Braddick (*b*), it was decided that if a ship be chartered to the Commissioners of the Navy, as an armed vessel, and an injury be done to another vessel by the misconduct of the persons on board of the former, while a commander of the navy and a King's pilot are on board, an action for the injury may be sustained against the owners of the chartered ship. If the circumstance of there being a pilot on board had been a good defence, it would not have been overlooked there. The next case in the order of time, after the case of the Neptune the Second, was that of Carruthers *v.* Sydebotham (*c*). The decision in this case, which was for the plaintiff against the underwriters, appears to proceed upon two principles; 1st. that the master being obliged to take the pilot under a penalty, the acts done by the pilot were to be considered as the acts of the pilot himself, and not of the master; and 2ndly, that the act of the pilot could not prejudice the assured, as the Pilot Act obliges all vessels, under a penalty, to take the first pilot who presents himself and his license (*d*), and such pilots are said to have the charge of ships while in the river (*e*), and as it was specially provided by the 52 Geo. 3, c. 39, s. 30, "*that no owner or master of any ship shall be answerable for any loss, nor be prevented from recovering upon any contract of insurance by reason of any neglect, default, &c., of any pilot taken on board under any of the provisions of that Act.*" The controversy was between the insurers and the insured upon a personal contract, and the question was whether the act producing the damage was an act of the assured by his servant, or a peril of the sea. There was privity of contract between

(*b*) 2 N. R. 182 E.; 46 Geo. 3.
(*c*) 4 M. & S. 77, E.; 55 Geo. 3.
(*d*) 37 Geo. 3, c. 71, s. 24, 37.
(*e*) Sect. 36.

CUMBERLAND. the parties, here it was tort between entire strangers, and the question was whether the loss should be incurred by the ship absolutely without blame, or by the ship producing the damage by the fault of its pilot. The provincial statute imposes no penalty upon the master for not taking a pilot; it merely subjects him to half pilotage dues. In the case of the Neptune the Second, as well as in the case before the Court, the proceeding was *in rem*. The case of The Attorney General *v.* Case (*f*) turned principally upon the question whether the 30th section of 52 Geo. 3, c. 39, extended to and embraced acts of pilots done under the Liverpool Local Act. Lord Chief Baron *Thompson*, in pronouncing the judgment of the Court, says expressly, "there were several cases quoted in which the masters and owners have been held liable, though in point of fact there had been a pilot on board; but those were cases prior to the 52 Geo. 3." It is to be observed, that the Liverpool Pilotage Act, which came under the consideration of the Court, in the last-mentioned case, contains a clause similar to the above clause in the provincial Act; and upon the construction of the clause in the Liverpool Local Act, Lord Chief Baron *Thompson* says, "in short, this Act imposes no penalty on the master, even for going to sea without a pilot, but only renders him liable to pay the wages which the pilot would have been entitled to, if he had thought fit to accept his services: now there is a penal clause in the 52 Geo. 3, &c." The judgment in that case was for the Crown. The case of Bennet *v.* Moita (*g*), which was an action against the master, turned entirely upon the construction to be given to the aforesaid 30th section of the general Pilotage Act; and the case of Ritchie *v.* Bowsfield (*h*) turned also upon the construction of the same clause, in an action against the master. Several of the foregoing actions are actions on the case,

(*f*) 3 Price 302; 57 Geo. 3.
(*g*) 7 Taunt. 258 H; 57 Geo. 3.
(*h*) 7 Taunt. 309; 57 Geo. 3.

the gist of which is negligence or misconduct in the defendant or his servants within the scope of their duty. The authority of the case of the Neptune the Second, has been questioned only with reference to the 30th section of the 52 Geo. 3, which is not noticed by Lord Stowell. The liability of the master can only arise from his own act or default, that of the ship seems to arise from the act of the ship, without reference to the person or persons in the ship from whose fault it may proceed. The principles which regulate the action upon the case do not seem to apply to a proceeding *in rem*. It is laid down in Browne (*i*) that proceedings *in rem* take place "in actions for collision, where there is no pretence for making the owner answerable or demanding reparation, as against him beyond the value of the ship" (*k*). That the English cases are based upon the special provision of the English Pilotage Acts, is stated by Bell (*l*), one of the most profound writers on commercial law, who, at the same time that he refers to those cases, refers to the case of the Neptune the Second, as settled law. On referring to American authorities we find that it was decided by the Supreme Court of Pennsylvania in Bussy *v.* Donaldson (*m*) that the owner of a ship doing damage to another is liable, though the ship was in the charge of a pilot. Chancellor *Kent*, in his Commentaries recognizes the same principle (*n*), and such is plainly the opinion of another distinguished jurist, in his notes to Lord *Tenterden's* Treatise on Shipping (*o*).

(*i*) Civ. & Adm. Law, ii. 397.

(*k*) For against the master, according to Bynkershoek there is remedy *in solidum*, and beyond the value of the ship.

(*l*) Bell's Com. 583.

(*m*) 4 Dallas, 206.

(*n*) Vol. 3, p. 135.

(*o*) Mr. Justice Story's edition of the work, Part II., ch. vii., s. 8, in notes.

Tuesday, 8th November, 1836.

SARAH—SINCLAIR.

SARAH. **Application for an attachment for contempt for resisting the process of the Court rejected; the statement of the officer being controverted by the affidavits of two other persons present at the arrest.**

Per Curiam.

In this case the motion for an attachment for contempt against Daniel Sinclair, the master of the Sarah, is founded upon the affidavit of John Tolland, who was employed by the marshal of the Court to execute the warrant of personal attachment against him, and who swears that upon his going on board the Sarah to execute the warrant on the 5th instant, Sinclair violently assaulted him, threatened to shoot him, and struck him, using various opprobrious terms towards him and towards this Court, and refusing to obey the tenor of the warrant. The charge contained in this affidavit is of a grave character, and would, if supported, have called for adequate punishment (*a*). The Court is bound to support its officers in the discharge of their duty, and will not fail upon all proper occasions to do so. But here the facts set forth in the affidavit of Tolland are directly contradicted in the affidavit of Sinclair, corroborated by the affidavits of the mate, and of the carpenter of the ship. The rule for an attachment must therefore be discharged.

(*a*) Clerke, Prax. Cur. Adm. Tit. 68, in fine.

Tuesday, 8th November, 1836.

SARAH—SINCLAIR.

Steward displaced and punished without cause is not bound to serve as cook, and may recover his wages.

Demand for watch, &c., taken by the master from the seaman's chest may be joined to the demand for wages.

JUDGMENT.—*Hon. Henry Black.*

The promoter shipped as steward on board the Sarah, whereof the defendant is master, on a voyage from Liverpool to Quebec and back to a port of discharge in Great Britain. Three weeks or a month after the vessel went to sea, the master, being dissatisfied with the manner in which the promoter discharged his duty as steward, displaced him, and put him out of the cabin, making him do the duty of cook and some of the duties of an ordinary seaman. After the promoter was so displaced the defendant inflicted punishments upon the promoter without adequate cause, and which would have been excessive and unwarrantable if cause for punishment had existed. It will be the duty of the Court to examine the evidence relating to this part of the subject more particularly in another action now ripe for judgment in this court, between the same parties, wherein the promoter claims damages for the acts of violence which in this suit are set forth as grounds for his discharge. The power of the master to displace any of the officers of the ship is undoubted, but he must be prepared to shew that he had lawful cause for so doing. In this case there is no evidence to shew such misconduct or neglect of duty, or insufficient discharge of duty on the part of the promoter, as to justify the defendant in displacing him. But, even if there had been sufficient reason for his

SARAH. discharge from the office of steward, I do not think that he was bound to remain with the ship after her arrival at the first port of discharge. His contract is to serve as steward during the voyage, and the master discharging him from this duty, he is discharged from the ship and entitled to his wages, unless some cause of forfeiture be shewn, which is not set up in this cause. I shall therefore award wages.

Then, as to the demand in the promoter's libel for his watch, with the key and seal attached to it, bank notes and coin, which he alleges the defendant took out of his the promoter's trunk at sea, against his will, and refuses to deliver up to him. It is objected that this ground of action ought to be made the subject of a separate action, and cannot be joined with the demand for wages. To support this objection would be to encourage a multiplicity of actions, very repugnant to the simplicity which obtains in this Court in controversies of this nature. The demand for the seaman's chest and apparel is usually joined with the demand for wages, and I know no reason why the watch or money or other effects of the seaman in his chest, or which had ceased to be there by the act of the master, should be distinguished from the apparel which usually forms the sole contents of the seaman's chest. In decreeing the wages, I shall at the same time decree that the defendant do deliver up with the promoter's chest these goods and monies, which ought not to have been removed from it. (*a*)

(*a*) The Louisiana, 2 Peters, Ad. Rep. 268.

SARAH—SINCLAIR.

Ten pounds sterling damages decreed to a steward for assaults committed upon him by the master, without cause.

JUDGMENT.—*Hon. Henry Black.*

This is a suit for damages brought by the steward against the master, for various assaults alleged to have been committed by the latter on the former, on the high and open seas during the voyage of the Sarah to this port. It appears that the promoter, having shipped as steward, was, upon some dissatisfaction on the part of the master with the manner in which the promoter discharged his duty as steward, displaced from that office, turned out of the cabin, made to act as cook and to do duty before the mast. It was subsequent to his being so displaced that the several assaults complained of in the present suit occurred. The evidence relating to these assaults establishes that the defendant struck the promoter with his fists, and with instruments not fitting to be used for purposes of correction; that the defendant on one occasion made the promoter, who is not a regular seaman, go aloft for the vane, which the service of the ship does not seem then to have required to be done, and which moreover could not be done by the promoter without danger to his life; and upon his failing to accomplish this object after a second effort the defendant made him strip and go upon his knees and beg his pardon. This incident occurred at night when the ship had a lift over, and when if the promoter had lost his hold he probably would have fallen into the sea and been drowned. The observation made by the defendant to the promoter when he was going up the

SARAH.

shrouds must not be passed over, as it serves to shew the temper of mind of the defendant at the time. He asked him whether he had made his will and to whom he had given his watch and money. It is further in proof that, on another occasion during the voyage, the defendant took the promoter out of the galley and made him take off all his clothes, with the exception of his trousers, and according to one witness tied him to the windlass, and according to this and several other witnesses, took him upon the poop and made him fast, having his body naked, to the spanker boom on a very cold morning,—so cold that there was snow and ice on the deck,—the wind blowing from the north, and kept him there about fifteen minutes: that the defendant ordered a seaman to draw him a bucket of water, which he emptied over the promoter's head and person, and kept him shivering with cold some ten minutes after. There is no evidence of the promoter's having done any acts calling for correction on the part of the master; he had at the time ceased to act as steward, but if he had committed acts requiring correction that correction must have been reasonable and moderate without any admixture of cruelty. Here the acts complained of are acts which appear to be dictated by a malignant spirit, the defendant availing himself of his power as master of the ship to gratify a personal enmity towards the promoter who was entitled to his protection. Independently of a general course of ill-treatment which the promoter appears to have been subjected to, the ordering him to bring down the vane, and the exposing him, with his body naked, on a cold morning, and throwing water over him as above adverted to, are acts of extreme cruelty, for which no circumstance of palliation can be offered. In assigning the damages, consideration must, however, be had to the means of the defendant, as well as to the nature of the injury done by him; and bearing in mind

the costs to which the defendant stands liable on these proceedings, I decree the sum of 10*l.* sterling (*a*). SARAH.

(*a*) "It is of importance that it should be known to those *who have the command of ships, that, under the colour of discipline, they are not to inflict unnecessary, wanton, and unlawful punishment upon those under their control,* when distant from the shores of their own country, friendless and unprotected, and that rash and improper chastisement ought not, must not be resorted to." Per the Recorder of London, in passing sentence of transportation for life upon Richard Edwards and John Woodcock, the master and mate of a merchant vessel, tried before the Central Criminal Court on the 7th April, 1837.—Nautical Magazine for May 1837, No. 5, Vol. i.

Thursday 10*th November*, 1836.

VENUS—BUTTERS.

VENUS. **It is a good defence in a suit for wages by a seaman, that he could neither steer, furl, nor reef.**

JUDGMENT.—*Hon. Henry Black.*

In this case the promoter shipped at Kingstown in Ireland, as a seaman, at the full wages of the other seamen engaged on board the vessel, but did not sign the ship's articles, and having come with the ship to Quebec, now claims the balance of his wages on the voyage out at the rate of 3*l.* a month, he having received one month's wages in advance upon being shipped. The defence set up to this claim of wages is that he is no seaman. It is proved by the officers of the ship that he could neither steer, furl, nor reef, and that his services were not worth more than 1*l.* a month. The promoter in receiving one month's advance appears to have received more than, under any circumstances, he would have been entitled to (*a*). I am not called upon in this case to determine whether a man being no seaman, shipping as a seaman, can recover anything in the shape of wages whatever. Such conduct has very much the appearance of a gross fraud on the master and ship, and may endanger the ship and the lives of all on board. If the individual here had been left in care of the ship's rudder, before his ignorance had been ascertained, without the supervision and presence of one of the officers of the ship as afterwards was found necessary,—the loss of the ship might have been the consequence. When the

(*a*) Basten *v.* Butter, 7 East, 479.

question of the right of a person so situated to a *quantum meruit* shall arise it will deserve consideration, whether the fraud of the party does not exclude the claim for a *quantum meruit* founded on equitable considerations, and whether there are not also considerations of public policy which are repugnant to any allowance whatsoever being made to a mere landsman shipping himself as an able-bodied seaman. VENUS.

Maguire, for promoter.
Gairdner, contra.

The George Gordon.—" Nautical Magazine for February, 1837, No. 2, Vol. i., p. 121.

Saturday, 12th November, 1836.

PAPINEAU—MAXWELL.

PAPINEAU. **The mate of a vessel is chargeable for the value of articles lost by his inattention and carelessness; and the amount may be deducted from his wages.**

JUDGMENT.—*Hon. Henry Black.*

This was an action brought by the mate of the brig Papineau, for wages claimed upon the termination of a voyage from Quebec to the West Indies and back again. There is no difference between the parties as to the amount of wages earned, these are admitted to be 18*l.* 13*s.* 9*d.* currency. The defence set up by the master is general misconduct, on the part of the mate, and a specific act of negligence in shipping rum on board of this vessel in the West Indies, whereby the head of one puncheon, of the value of 12*l.* currency, was stove in, and its contents spilled and lost. This being the only act of misconduct set up by the defendant, the attention of the Court is confined to it. It appears that the mate about the 2nd or 3rd of September last at the port of Kingston, in the Island of St. Vincent, received on board the vessel, about fourteen puncheons of rum from a drogher. To remove these from one part of the hold of the vessel to another there were used skids, that is, boards choked or fixed and steadied with wedges to roll the puncheons upon. One of these skids not being choked slipped, and in consequence the head of one puncheon was stove in and its contents lost. The operation was performed by candle light, with two men not belonging to the crew, under the superintendence of the mate. It is the general duty of the mate to take in the cargo and deliver it, and in the discharge of that duty, in this instance, he

PAPINEAU.

was bound to see that the skids were properly fixed, and is responsible for any damage arising from their being, as they appear to have been, insufficiently steadied, and not choked, as is usual. The loss must be made up by some person, either the owners of the ship, the master and crew, or the mate. The two former are entirely exempt from blame. It does not appear that the master or the crew participated actively or passively in this act of negligence, and hard as it may fall upon the mate, he being the person in fault, must indemnify the sufferers (*a*). The rule of law as to the liability of the officers and crew of a ship to shippers cannot be relaxed without infinite mischief. I decree, therefore, that there be deducted from his wages the 12*l.* value of the puncheon lost, and I decree the balance of his wages being £6 13*s.* 9*d.* (*b*)

Cairns and Dickenson, for the mate.
Huot, contra.

(*a*) The New Phœnix, 2 Haggard, 420; the Belvidere, 1 Peters, Ad. Rep. p. 258.

(*b*) A chief mate suing for wages in the Court of Admiralty is bound to shew that he has discharged the duties of that situation with fidelity to his employers. Amongst the most important of these duties are a due vigilance, care and attention to preserve the cargo from robbery; but he is not responsible for any embezzlement that may occur, not arising from any neglect of duty.—The Duchess of Kent, Newby, 1 W. Rob. 285.

Friday, 18*th November*, 1836.

SOPHIA—EASTON.

SOPHIA.

Master admitted as a witness in a case of pilotage. Damage occasioned to the ship by the misconduct of the pilot, may be set off against his claim for pilotage.

JUDGMENT.—*Hon. Henry Black.*

This is a suit for services rendered by the promoter, who is a branch pilot, to the brig Sophia, in piloting her from Bic to Quebec, in October, 1834. The amount charged for the pilotage stands admitted. The defence set up by the owners, who have intervened in the suit against the ship, is that the promoter conducted himself so negligently and unskilfully in bringing the vessel to, and mooring her in the harbour of Quebec, that she went foul of another ship, whereby the bowsprit, jib-boom, fore-top-gallant-mast, bulwarks, and stanchions of the Sophia were carried away, and damage suffered to an amount exceeding the sum claimed for pilotage. The principal witness offered on the part of the defence is the master of the Sophia, who was master at the time the collision took place. None of the crew who were on board at the time are now here, and this is the fourth voyage of the ship to Quebec since the accident happened. The harbour-master proves the condition of the ship, after the occurrence of the accident; and the superintendent of pilots proves that the ship was in a damaged condition at that time, and that the master preferred a written complaint to him against the promoter. The questions which arise in this case are, first, whether the master is a competent witness; and the next, whether the defendants can set up the collision and damage as a

defence to the present action. The question of the competency of the master as a witness in suits with seamen came under the consideration of the High Court of Admiralty in the case of the Exeter (*a*), and the case of the Lady Ann (*b*). In the former of these cases, the question turned upon the validity of a discharge of the mate by the master, without calling the attention of the passengers and crew to the circumstances attending it; and the master was virtually called upon to justify himself, and relieve himself from the responsibility incident to the discharge, if it were an improper one. The last of these cases, which occurred as late as 1810, was a proceeding against the owners; the defence set up was desertion, not implicating the master individually towards the owners, and Lord *Stowell* held the master to be a competent witness; if this be true in the case of a seaman's suit against the ship, it cannot be less so in the case of a pilot. The master is not answerable, even to the owners or to any other persons, for the acts of the pilot in whom the navigation of the ship is (*c*). The evidence of the master must, however, be carefully weighed. If he be the only witness upon the present occasion, the promoter has to impute it to himself, in not having brought his action earlier; and the delay in bringing the action, which is altogether unexplained on his part, constitutes a presumption against the promoter, that the demand has no foundation in justice or equity. The complaint of misconduct having been made in regular course to the superintendent of pilots, and no measures taken by the promoter to enforce his claim at that time, his inaction has very much the appearance of an acquiescence in the justice of the defence now set up on the part of the owners. Taking the evidence of the master to be legal

(*a*) 2 Rob. 267.
(*b*) Edw. 235.
(*c*) Molloy, B. 2, c. 9, 1 & 2; 3 Kent's Com. 135.

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evidence in the cause (*d*), the misconduct complained of appears to me to be sufficiently established.

Then the only remaining inquiry is, whether the damage suffered thereby may be made a set-off against the promoter's demand. Courts of Admiralty may, and do entertain pleas of set-off, upon general principles of equity, where the claim attaches to the particular maritime demand submitted to their cognisance by the libel (*e*). The rule and practice of the Admiralty, in this respect, seems to be the same as that which has obtained in the continental courts, under the name of re-convention (*f*). The damages in the present case exceeding the amount claimed, I decree for the defendants (*g*).

(*d*) Glassford's Principles of Evid., 443; Holt on Shipping, Vol. i., p. 464 ed. of 1820; The Malta, 2 Hagg. 165.

(*e*) The New Phœnix, 2 Hagg. 420; Abbott on Shipping, Amer. ed. of 1829, p. 473; Latham *v.* West, 5 Martin's Louis Rep. 573.

(*f*) Toullier, Liv. 3, Tit 3, Ch. 5, s. 4, No. 359, Tom. 7, p. 435.

Les dommages et intérêts sont une suite nécessaire, non-seulement de tout crime, mais encore de toute impéritie, négligence, faute même tres-légères, quelle que soit leur nature, qui, à raison de ce, mérite une sévère punition. Argument tiré des Lois, 3. s. 5, l. 5, ff. Nautæ. Institution au Droit Maritime, par Boucher, s. 574, p. 151.

If a pilot undertake the conduct of a vessel to bring him to St. Malo, or any other port, and fail of his duty therein, so as the vessel miscarry by reason of his ignorance in what he undertook, and the merchants sustain damage thereby, he shall be obliged to make full satisfaction for the same, if he hath wherewithal; and if not, lose his head. Leg. Oleron, Ch. 23.

(*g*) Decision to same effect in the case of the Clyde, 6 Aug. 1840, and the Canada, 12 November, 1841.

Thursday, 1st December, 1836.

ADVENTURE—PEVERLEY.

Probatory terms are in general peremptory, but may be restored for sufficient cause.

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Per Curiam.

Upon the libel being admitted, a probatory term was assigned on the 9th instant for the promoter to produce witnesses, and prove the allegations in his libel on or before the next court day, which was on the 11th. The defendant having filed his responsive plea on the 23rd, the Court in like manner assigned as a probatory term to the defendant the next court day, which was the 25th. It now appears that the promoter examined, within the probatory term assigned to him, the following witnesses, Regis Jean, Pierre Dupuis dit St. Michel, and Joseph Savard; and after the expiration of his probatory term, the following witnesses, Thomas Colbourn, William Peverley, and Pierre Goudreau. As well the proctors of the parties as the registrar of the Court appear to have been in error, in supposing that it was competent to them to examine witnesses after the expiration of the probatory term to them respectively assigned. To have authorized these examinations, it was absolutely necessary that continuances of the probatory term should have been had. I am not authorized to grant publication of the depositions taken subsequently to the expiration of the probatory term: but, as the parties appear to be in error, I will entertain a motion from either or both to be restored to a term probatory, and will assign a new day for the parties to prove their pleas, if a motion should be made to that effect. In the absence of a formal consent of the parties by their proctors, I see no other course by which

ADVENTURE. the justice of this case be attained. The grounds upon which a party may be restored to his probatory term will be found in Oughton (*a*). It will there be seen that this restitution is anything but a matter of course; and I wish it to be distinctly understood that if the probatory term be restored, it is merely from the consideration that both parties seem to have been in *pari errore*; and from the laxity of the practice which has hitherto obtained in this Court, their error may be considered as a venial one. The same reason will not apply to any future case, and I shall not feel myself at liberty to relax the strict rule under which probatory terms are considered peremptory.

(*a*) Oughton's Ordo Judiciorum, Tit. 75, Ob. Sub. lit. (*i*).

12. Licet Terminus Probatorius, assignatus per Judicem Litigantibus, dicatur esse peremptorius; ita ut Pars Actrix, sive Rea, tenetur producere Testes suos infra eundem: Tamen, ex causis quibusdam, Partes litigantes restituendæ sunt in novum Terminum Probatorium;

13. Exempli gratiâ; Si locus judicii non sit tutus; utpote, quia Pestis ibidem sæviebat, toto Termino Probatorio, vel pro majori parte ejusdem, Pars non tenetur hujusmodi locum adire, et (si Pars voluerit) Testes non sunt compellendi, ad comparendum in tali non tuto loco;

14. Si, pendente Termino Probatorio, Causa fuerit (Consensu Partium) compromissa, vel in Arbitros relata, et ita steterit toto Termino Probatorio, vel pro majore parte ejusdem;

15. Si Pars principalis, quæ Testes produceret, fuerit continuò incarcerata, vel ita ægrota, ut (sine periculo vitæ) non potuerit adire locum Judicii, vel Causam prosequi;

16. Si fuerit Regii Negotiis impedita, pendente hujusmodi Termino Probatorio; danda est Restitutio.

17. Sunt etiam nonnulla alia impedimenta, propter quæ concedenda est Restitutio; quæ relinquntur boni Judicis Arbitrio.

18. Si, Impedimentis hujusmodi allegatis, et Restitutione petitâ, Pars adversa hujusmodi Restitutioni obsteterit, et ea (vera esse inficiando) negaverit, cogeretque Adversarium eadem Impedimenta probare; si probaverit; Adversa Pars (hanc Probationem cogens) est condemnanda in expensis, eâ ratione factis, et concedenda est petita Restitutio.

19. Et, e contrà; si Petens hanc Restitutionem defecerit, in Probatione causarum allegatarum, ad obtinendum Restitutionem; deneganda est Restitutio, et condemnanda est Pars, petens Restitutionem in Expensis retardati Processûs.

Wednesday, 7th December, 1836.

ADVENTURER—PEVERLEY.

Pilots may become entitled to extra pilotage in the nature of salvage for extraordinary services rendered by them. The jurisdiction of this Court is not ousted, in relation to claims of this nature, by the Provincial Statute, 45 Geo. 3, c. 12, s. 12.

JUDGMENT.—*Hon. Henry Black.*

This is a claim of salvage set up by the promoter, who is a branch pilot for the river St. Lawrence, for services by him rendered to the brig Adventurer, which was stranded at Mille Vaches in the river St. Lawrence, on her voyage to Quebec, about the sixth of October last. From the depositions in the cause it appears that, soon after the stranding of the brig, the master took the promoter on board as a pilot, and promised him a remuneration for any extra time that he might be detained there. On going on board upon the 9th of that month, he found the rudder unshipped, and that there were between two and three feet of water in the hold, but the weather was not boisterous, nor was the brig in any immediate danger. The promoter taking charge of the brig, the rudder was shipped, a kedge taken out astern, and the brig lightened by throwing out a small quantity of coals and other portions of her loading. The master having on the previous day hired the schooner Louisa, she came alongside, and continued with the brig till her arrival opposite Kamouraska, where her loading from the brig was completed, and she proceeded to Quebec with the master and the promoter on board, piloted by the promoter. Upon the lightening of the brig at Mille Vaches, as already stated,

ADVENTURER. she floated, and proceeded under charge of the promoter, as pilot, to Cacona, where the master of the schooner went on shore for assistance, and returned with fifteen men, for the purpose of pumping the brig, the water gaining on her. On Wednesday, the 12th of October, these hands came on board, and in the afternoon the wind began to freshen, and it came on to blow, with snow, so that at intervals it was impossible to see the land, in consequence of which the vessel was laid to; but at the instance of the master she was put before the wind by the promoter, and brought to an anchor at the foot of the traverse, the weather still continuing stormy, and so thick that it was impossible to see the land. The brig having remained about ten hours at anchor, and the wind changing to the westward, the anchors were got up, and the brig was by the promoter, against the wishes of the master, run down to Kamouraska, where she was put ashore, and lay in safety upon the muddy bank of an island called Cow Island, at which place the schooner, with the promoter and the master left her. Some blame has been imputed to the promoter for taking the brig back to Kamouraska, but the Court sees no reason to doubt the soundness of the discretion exercised by him on that occasion. The promoter piloted the schooner from Kamouraska to Quebec, and afterwards returned with the master in a steamboat, by which the brig was towed into Quebec in safety, under the care of the promoter, until she came alongside of the wharf there on the 21st of the month.

There being no question as to the facts of the case, the sole inquiry for the Court is whether, under the foregoing circumstances, the promoter is entitled to any extraordinary remuneration for his services, and what that remuneration ought to be. It is a settled rule, that pilots assisting vessels in distress, beyond what their mere duty requires, are entitled to an additional pilotage as a compensation

for their extra services. "It is held expedient for the general safety of navigation, that persons ready on the water, and fearless of danger, should, by liberal reward, be encouraged to go out for the assistance of vessels in distress" (*a*). Pilots are not in strictness entitled to salvage, their duties are necessarily hazardous, but under extraordinary circumstances of peril or exertion, they become entitled to an extra pilotage, as for a service in the nature of a salvage service (*b*). To the authorities derived from English and American sources may be added the following reasons for the rule, as assigned by Valin, in his commentary upon the thirteenth article of the third title and fourth book of the Marine Ordinance of Louis XIV. "En effet, quoique la taxe soit faite sans distinction des saisons ni des circonstances qui peuvent allonger ou accourcir le temps du pilotage, elle n'est jamais censée porter sur des cas extraordinaires, tels que ceux d'une tourmente et d'un peril manifeste. Il est donc naturel alors d'accorder au lamaneur une taxe particulière et extraordinaire, eu égard a son travail aussi extraordinaire, et au danger qu'il a couru. Mais ce n'est pas à lui, à fixer la rétribution qui lui est dûe; et si le maître n'en convient pas à l'amiable avec lui, après le péril passé, c'est au juge à la regler, de l'avis de gens experts, tels que sont des armateurs, et des capitaines de navires" (*c*). The exertions and services of the promoter in this case are clearly beyond the immediate scope of his duty as pilot, and entitle him to remuneration in the form of extra pilotage (*d*).

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(*a*) Per Lord Stowell, apud. 1 Rob. 313, case of the Sarah.

(*b*) The Joseph Harvey, 1 Rob. 306; The General Palmer, 2 Hagg. 176; The Enterprise, ibid. 178 in note; The City of Edinburgh, 2 Hagg. 333; The Peragio, Bee's Cases in the District Court of South Carolina, p. 212; 1 Bell's Com. 594; Abbott on Shipping, Story's note 161; 3 Kent's Com. 198.

(*c*) Commentaire sur l'Ord. de la Marine, Tom. 2. p. 503.

(*d*) Boucher, Inst. au Droit Maritime, 2682; Vincens, Expo-

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In settling the quantum of remuneration in these cases the Court must be guided by the particular circumstances of each particular case. The reward must be so apportioned that pilots may be encouraged to strenuous exertion in cases of danger, it being, however, borne in mind that the natural and ordinary duties of their vocation necessarily exposes them to dangers, for the encountering of which a liberal allowance is secured to them in the ordinary rates of pilotage, and in an exclusive possession of this source of emolument. No persons are more capable of fixing the quantum of remuneration than the Trinity Board, whose duty it is to exercise a general superintendence over this body of men. The Legislature has wisely vested the power in the Trinity Board, and enabled them to execute it in a summary form, and at little expense. "For the encouragement of pilots, who shall distinguish themselves by their activity and readiness to aid and assist any ship or vessel in distress, and in want of a pilot in the river St. Lawrence," it is enacted (*e*) "that the master or owner of any ship or vessel in distress, and in want of a pilot in the river St. Lawrence, shall pay unto any pilot who shall have exerted himself for the relief or preservation of such ship or vessel, such sum, for extra services, as the said master or owner and pilot may agree upon; and in case no such agreement shall be made by the parties aforesaid, the Master, Deputy Master and Wardens of the Trinity House of Quebec, or any two or more of them (whereof the said Master or Deputy Master shall be one), are hereby empowered, upon the petition of such master, owner or pilot, or either of them, to ascertain and declare by an award and order, under the hands and seals of them, or any two of them, as aforesaid, the sum which

sition Raisonnée de la Législation Commerciale, Tome 3me, p. 107.

(*e*) 45 Geo. 3, c. 12, s. 12.

shall be paid by such master or owner, to such pilot for such extra services as aforesaid, and such sum so as aforesaid ascertained and declared, shall be levied in manner hereinafter directed" (*f*). The rule as to the allowance of extra pilotage in cases like the present one, which is recognised in the decisions of the English and American Courts, is positively sanctioned by an enactment in the Marine Ordinance of Louis XIV. (*g*). This article, in enacting that there shall be in cases of extraordinary danger or difficulty an allowance of extra pilotage to the pilot, vests in a summary tribunal the power of regulating the quantum of the extra allowance to be made to the pilot, a provision analogous to that which is contained in the clause of our provincial statute, which has been already adverted to. The rights of the parties, the interest of trade, and the substantial justice of cases of this description are all consulted and promoted by this provision. The jurisdiction of this Court, however, is not excluded by the statute; and although I may regret that this more summary proceeding has not, upon the present occasion, been adopted, yet I am bound to give judgment upon the claim brought before me. The services of the promoter are clearly meritorious ones, exceeding his ordinary duties as pilot, and entitle him to an extra remuneration. Besides this, there was an express agreement between him and the master, on

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(*f*) The Act containing the above provision was repealed by an Act passed on the 30th of May, 1849, to consolidate the laws relative to the powers and duties of the Trinity House of Quebec (12 Vict. c. 114), the 42nd section of which contains the following provision:—

"And be it enacted, that any pilot saving or endeavouring to save a vessel in distress shall be entitled to a remuneration to be fixed by the Trinity House of Quebec, if such pilot shall not have agreed with the master or owner of the vessel as to the compensation for such service, provided he be not the pilot on board and in charge of such vessel."

(*g*) Liv. 4, tit. 3, art. 13.

ADVENTURER. entering into the service of the vessel that he should receive an extra allowance, which under the statute was a good and valid agreement. I therefore award to the promoter a sum equal to double the ordinary rate of pilotage. In this sum is included any remuneration to which the promoter might lay claim for piloting the schooner Louisa to Quebec, considering him while on board of the Louisa, as being there in the service of the Adventurer (*h*).

(*h*) A pilot, while acting within the strict line of his duty, however he may entitle himself to extraordinary pilotage compensation for extraordinary services, as contra-distinguished from ordinary pilotage for ordinary services, cannot be entitled to claim salvage. In this respect he is not distinguished from any other officer, public or private, acting within the appropriate sphere of his duty. But a pilot, as such, is not disabled, in virtue of his office, from becoming a salvor. On the contrary, whenever he performs salvage services beyond the line of his appropriate duties, or under circumstances to which those duties do not justly attach, he stands in the same relation to the property as any other salvor, that is, with a title to compensation to the extent of the merit of his services, viewed in the light of a liberal public policy.

Hobart *v.* Drogan, 12 Peters's Reports, Supreme Court of the United States, p. 117.

Tuesday, 21st February, 1837.

ROYAL WILLIAM—PENNEL.

ROYAL WILLIAM.

In case of wreck in the river St. Lawrence (Rimouski), the Court has jurisdiction of salvage.

Under the circumstances of this case the service is a salvage service, and not a mere *locatio operis*, though an agreement upon land was had between the parties in relation to such service.

In settling the question of salvage, the value of the property, and the nature of the salvage service, are both to be considered.

Salvors have a right to retain the goods saved, until the amount of the salvage be adjusted and tendered to them.

JUDGMENT.—*Hon. Henry Black.*

This is a claim as for salvage by the promoters on the schooner Royal William, of the burthen of forty-five tons, and her cargo, she having gone ashore on the 25th of October last, between Barnabé Island and Rimouski, in the river St. Lawrence. The material facts are that this schooner, laden with fish on a voyage from St. George's Bay, in the Island of Newfoundland, to Quebec, was overtaken by a storm, as she was lying off the east end of Barnabé Island at anchor, of such violence as to part her cables, and oblige her master to run her ashore at Rimouski, between Barnabé Island and the main land. The captain and crew left the ship, and went on shore, and in consequence of a communication which took place between him and the promoters, they went on board the vessel, hired carters and labourers, and removed and stored the whole of the cargo at Rimouski. In this work they appear to have been engaged three days, and to have slept on board the vessel. The tide ebbed and flowed in her, and she was lying over in about ten inches of water at low tide. At the end of the three days, the

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master and crew went on board, and unrigged her, and the rigging was carted and stored with the cargo. The written power from the master to the promoters, which was executed upon his first coming on shore, authorises them to take possession of the ship; and some of the witnesses swear that the master had stated verbally, that they were so authorised. The master does not seem to have understood the French language, in which this authority is written, and several witnesses swear that no authority was given by him to the promoters to take possession of the vessel. This fact, however it may have been, does not seem material; the only questions before the Court, are questions upon which the fact of possession has no bearing. These questions are:

1. Has the Court jurisdiction in cases of salvage, occuring at the place where this vessel was wrecked.

2. Are the promoters entitled to salvage, and if so, what ought to be the quantum thereof.

Upon the first question, it appears that whatever doubts might have existed as to the jurisdiction of this Court in cases of salvage occuring in the river St. Lawrence, previous to the passing of the 2 Wm. 4, c. 51, those doubts must be considered entirely set at rest by that statute, the sixth section of which is as follows:— "Whereas in certain cases doubts may arise as to the jurisdiction of the Vice-Admiralty Courts in His Majesty's possessions abroad, with respect to suits for seamen's wages, pilotage, bottomry, damage to a ship by collision, contempt in breach of the regulations and instructions relating to His Majesty's service at sea, salvage and droits of Admiralty: be it therefore enacted, that in all cases where a ship or vessel, or the master thereof, shall come within the local limits of any Vice-Admiralty Court, it shall be lawful for any person to commence proceedings in any of the suits hereinbefore mentioned in such Vice-Admiralty Court, notwithstanding

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the cause of action may have arisen out of the local limits of such Court, and to carry on the same in the same manner as if the cause of action had arisen within the said limits." It has been argued that this is a contract upon land, and the case has been attempted to be assimilated to the ordinary contract of hiring, *locatio operis*, to land goods from a ship; but this view of the case is incomplete and inaccurate. The right of the promoters depends not merely upon a *locatio operis;* it is for their services in saving the cargo on board of a ship wrecked in the river St. Lawrence, and abandoned, which is clearly a case of salvage (*a*). The agreement between the promoters and the master is incidental to salvage in a case of wreck. In determining whether the Court has jurisdiction or not, we must look at the nature of the principal subject of controversy; and if it be within the jurisdiction of the Court, it will draw along with it all accessary matters.

We are then to look at the nature and value of the services performed by these parties. They go on board the ship, hire carters and labourers, superintend the removal of the cargo, and remain,—with some personal inconvenience, though I think without any personal risk or danger,—on board during the night. The master and crew had left the vessel upon her stranding, and returned to her at the end of three days for the purpose of unrigging her, after her cargo had been discharged, and then finally abandoned her.

I do not see any salvage service rendered to the ship, which can entitle the promoters to salvage compensation in respect to it. They appear to have gone on board the ship for the purpose of removing the cargo, and there is no evidence of any service having been rendered

(*a*) Happy Return, 2 Hagg. 206. See also the case mentioned in a note, of a claim of salvage for the unlading and housing of goods, from a wreck brought into Pagham Bay.

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to her after that removal, or indeed required. As to the cargo, the promoters are clearly entitled to a salvage compensation, and the sole question is, as to its quantum. The claim of the promoters embraces two heads; first, for disbursements laid out by them in removing, and putting into a place of safety the cargo; and next, a claim of compensation for their personal services, in directing and superintending the saving of the cargo. There does not seem to be any doubt as to the sum to be allowed for the disbursements. Mr. McKinnon states that the costs of landing the cargo might be about 20*l.*, and that he was in treaty with individuals on shore, to land it for that sum. The total sum charged by the promoters is 35*l.* 16*s.* 6*d.*, of which 15*l.* is for the hire of the store into which the cargo was placed, and 2*l.* 5*s.* for notarial charges, &c., leaving 18*l.* 11*s.* 6*d.*, for the disbursements incurred by the promoters in putting the cargo on shore, which may therefore be taken to be a moderate and reasonable charge. The services of the promoters relate to the saving of the cargo; their remaining on board of the ship during the night whilst the cargo was delivering, is evidence of their zeal and attention in the performance of this service. In settling the question of the salvage, the value of the property and the nature of the salvage service are both to be considered. The parties have consented to a valuation of the property saved at 100*l.* for the ship, and 264*l.* 5*s.* for the cargo, from which last sum deducting 120*l.*, the expense of transport from Rimouski to Quebec, there is left the net value of 144*l.* 5*s.* It appears that of 35*l.* 16*s.* 6*d.* charged by the promoters, 15*l.* was paid by the claimant before the owner of the store would allow the cargo to be removed, reducing their account of disbursements to 20*l.* 16*s.* 6*d.* I think that to this there ought to be added a further sum of 20*l.*, that is 10*l.* each, to the promoters for their salvage services, and I accordingly decree in

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favour of the promoters for 40*l.* 16*s.* 6*d.* currency. The expenses of the commission, amounting to 9*l.* 19*s.* 6*d.* are also to be paid by the claimant.

I am sensible that the salvors must have been put to considerable inconvenience and expense in prosecuting this suit, in consequence of the distance of their residence from the seat of the jurisdiction of this Court. But it is not in my power, sitting here, to give them any relief on this score; indeed, the inconvenience to which they have been subjected is due to themselves. Their course was very plain, that of retaining the goods saved until the salvage was adjusted and tendered to them (*b*). They have thought proper to adopt another one, entailing upon themselves expense and inconvenience, which might have been obviated by exercising their legal right of retention (*c*).

(*b*) Hartford *v.* Jones, 1 Lord Raym. 393; the Blenden-hall, 1 Dodson, R. 414.

(*c*) A person who by his own labour preserves goods which the owner, or those entrusted with the care of them, have either abandoned in distress at sea, or are unable to protect and save, is entitled by the common law of England to retain the possession of the goods saved until a proper compensation is made to him for his trouble. This compensation, if the parties cannot agree upon it, may by the same law be ascertained by a jury, in an action brought by the salvor against the proprietor of the goods; or the proprietor may tender to the salvor such sum of money as he thinks sufficient, and upon refusal to deliver the goods, bring an action against the salvor; and if the jury think the sum tendered sufficient, *he will recover his goods, or their value*, and the costs of his suit. Petersdorff's Abridgement, Vol. 11, p. 483.

As to the right of retention, under the French and Civil law, see Troplong, Des Priviléges et Hypothèques, Tome premier, No. 175, p. 256, No. 264, p. 386; Pardessus, Cours de Droit Commercial, Tome 3eme, No. 955, p. 557; Voet ad Pand. de Compens. No. 20.

Saturday, 24th June, 1837.

FRIENDS—DUNCAN.

FRIENDS. **The Admiralty jurisdiction, as to torts, depends upon locality, and is limited to torts committed on the high seas. Torts committed in the harbour of Quebec are not within the jurisdiction of the Admiralty.**

JUDGMENT.—*Hon. Henry Black.*

This suit is brought by the promoter, a passenger on board the barque Friends on her voyage from Dublin hither, against the defendant, the master, for the recovery of damages; and the promoter sets forth in his libel divers injuries alleged to have been committed against him by the defendant, as well during the voyage as at this port of Quebec, where the vessel has latterly arrived. No objection is made to those articles in the libel which set forth injuries alleged to have been committed on the high seas; the only question for the consideration of the Court now is, as to the admission of the fourth article in the libel, setting forth those injuries which are alleged to have been committed in this port. The promoter, in this article, alleges that during the voyage, and before its completion, and while the ship was "in the river St. Lawrence, off the city of Quebec, in the port of Quebec," within the ebbing and flowing of the tide, and within the jurisdiction of this Court, a child of a relation of the promoter died, and that the defendant had maliciously accused the promoter of having murdered the said child, and published and proclaimed the same, and prevented the promoter from interring it, and caused the coroner for the district of Quebec to go on board the barque to hold an inquest on the said child. That on the evening of the same day the defendant placed the promoter in irons, and sent him on shore to gaol, with circumstances of peculiar cruelty.

FRIENDS.

It is objected that the acts here complained of being alleged to have been committed at a place which is *infra corpus comitatus*, the Court has no jurisdiction.

In all cases of jurisdiction the Court is called upon to perform a delicate and important duty. As on the one hand it is the duty of the Judge to maintain unimpaired the jurisdiction wherewith the law has invested him, so on the other he must be cautious not to assume authority on matters beyond the pale of his jurisdiction. He can have no inclinations or bias either way. The power which he is to exercise is held by him in trust, and must be maintained in its integrity, neither enlarged nor abridged, within the precise limits which the law has defined. Sir *Thomas Strange* has expressed with peculiar felicity the duty of a Judge in this particular, "It is said in many cases *boni judicis est ampliare jurisdictionem*. If for *jurisdictionem* be read (as was always read by Lord *Mansfield*) *justiciam*, it is a noble maxim. If an object and matter of jurisdiction exists, it is indeed the part of a Judge, so far as circumstances may admit, to administer an enlarged and amplified justice, embracing the interests of all parties and all the bearings of the case in any other sense of the maxim. It seems to me that the strength of every jurisdiction consists mainly in a temperate admeasurement of it by those in whom it is vested; and that so far from its being the duty *boni judicis ampliare*, it becomes none more than Judges to set to others in power a different example, instead of, by overstrained constructions, and upon fanciful imaginations, to be outstepping the bounds set by their commission. Neither are we to presume that justice will not be done, though this Court, sustaining the plea, should decline the office of rendering it." (*a*). From the peculiar

(*a*) Per Sir Thomas Strange, Chief Justice of the Supreme Court of Judicature at Madras, in the case of Nagapah Chitty *v.* Rachummah and Kenehpah, 9th March, 1802. See his Notes of Cases, Vol. 1, p. 136.

FRIENDS. nature of the class of questions to which that now under consideration appertains, I shall feel it necessary to enter more fully into the grounds of the conclusion to which I have come than any difficulty in the question itself would call for. I am of opinion that this Court has not jurisdiction of matters of the nature of that set forth in the fourth article of the libel. This article sets forth a malicious accusation, assault, and false imprisonment, committed within the harbour of Quebec, that is a personal tort committed within the body of the county. It has been thought that certain general terms contained in the commission of the Judge, conferred upon the Court power to take cognizance of matters happening in ports, harbours, &c., in this province, in the same manner as if they had happened *super altum mare*. The words of the commission referred to for the purpose of establishing this doctrine are those granting power to the Judge to take cognizance of and proceed in "any matter, cause or thing, business or injury, whatsoever, done or to be done, as well in, upon, or by the sea or public streams, fresh waters, ports, rivers, creeks, and places overflowed whatsoever within the ebbing and flowing of the sea or high water-mark, as upon any of the shores or banks adjoining to them or either of them." The Judicial Commissions of the Admiralty are of very high antiquity, and were settled long before the statutory provisions and legal decisions, whereby the jurisdiction of the Admiralty, as it was originally exercised, was materially abridged. But "it is universally known," says Lord *Stowell*, "that a great part of the powers given by the terms of that commission are totally inoperative, and that the active jurisdiction of the Admiralty stands in need of the support of continued exercise and usage"(*b*): and again,

(*b*) The Apollo, 1 Hagg. 312.

in the case of the Atlas, he says, "This Court, except upon the subject of prize, exercises an original jurisdiction, upon the grounds of authorised usage and established authority. The history of the laws of this country shows full well that such authorised usage and established authority are the only supports to which this Court can trust, except in respect to the subject to which I have alluded (*c*)." In the commission to the Judge of the Vice-Admiralty Court, he is enjoined to try and determine according to the civil and maritime laws and customs of the High Court of Admiralty of England. Now, nothing can be more clear than that the High Court of Admiralty could not exercise jurisdiction in the case of a personal tort committed in a port or harbour lying *infra corpus comitatus*. Lord *Mansfield*, in Lindo *v.* Rodney, says, "The statutes of 13 and 15 Ric. 2, and 2 Hen. 4, do not exclude the common law in any case, and they confine the Admiralty by the locality of the thing done, which is the cause of action; it must be done upon the high sea. If done in ports, havens, or rivers, within the body of a county of the realm, the Admiralty is excluded (*d*)." There is no authority, or case, or dictum, to show that for a personal tort committed elsewhere than on the high seas, the Admiralty has jurisdiction (*e*). And all the elementary treatises are to the same effect. The Courts of Admiralty in the United States of America have held, that many of the old and established decisions of the common law courts in England, restrictive of the powers of the Admiralty, are encroachments upon the

FRIENDS.

(*c*) 2 Hagg. 55.

(*d*) Douglas, 615.

(*e*) Hawkeridge's case, 12 Rep. 129; Moore, R. 892; Violet *v.* Blague, Cro. Jac. 514; Velthasen *v.* Ormaley, 3 Term. Rep. 315; Com. Dig. Tit. Admiralty, F. 2; 2 Browne's Law of the Admiralty, 111; Viner's Ab. Tit. Court of Admiralty, E. 5; Caton *v.* Burton, Cowp. 330.

FRIENDS. legitimate powers of the Admiralty; and have, in consequence, maintained a more extensive jurisdiction than that which obtains in the British Courts of Admiralty (*f*). Notwithstanding this, however, those Courts do not appear to have ever set up a claim to jurisdiction in respect to personal torts committed in their harbours. Nor can I find any trace of such a claim set up in any of the old or present British colonies. I feel, therefore, with Sir *Christopher Robinson*, "that it is my duty not to adventure beyond the known limits of my authority, and I should only involve the parties in expense and disappointment were I to encourage any such experiment" (*g*).

It seems to have been supposed by the promoter's counsel that the relation which had subsisted between these parties, of passenger and master, might make a difference, but I do not see that it can (*h*). The action of the promoter must be either in tort or in contract. If his right of action be looked at as growing out of a contract, then the contract was a contract upon land; and the general rule is that if a contract be made on land to be executed at sea, or be made at sea to be executed on land, the common law has the preference, and excludes the Admiralty (*i*). The cause must arise wholly upon the sea, and not within the precincts of any county, to give the Admiralty jurisdiction. Suits for seamen's wages are an exception to this rule (*k*). The cases where the Admiralty has jurisdiction by reason of the subject matter, and where the proceeding is *in rem*, are a class by

(*f*) See the learned and elaborate judgment of Mr. Justice Story upon this point in the case of De Lovio *v.* Boit, 2 Gallison, 398.

(*g*) Public Opinion, 2 Hagg. 403.

(*h*) 2 Browne's Law of the Admiralty, 94.

(*i*) 3 Black. Com. 106; Comyn's Dig. Tit. Admy. F. 4 & 5.

(*k*) Howe *v.* Nappier, 4 Burr. 1950; Anonymous, 1 Ventris, 146.

themselves (*l*), and need not be adverted to in a case like the present, where jurisdiction is set up by reason of the locality of the act complained of. I reject the fourth article of the libel.

Bradley, for the promoter.
Bowen, contra.

(*l*) Menetone *v.* Gibbons, 3 T. R. 267.

Friday, 30*th June*, 1887.

FRIENDS—Duncan.

Friends.

The Admiralty has jurisdiction of personal torts and wrongs committed on a passenger on the high sea, by the master of the ship.

Unless in cases of necessity, master cannot compel a passenger to keep watch.

Judgment.—*Hon. Henry Black.*

This is a case of very considerable importance in point of principle, to which the Court has felt it a duty to bestow its best attention. The claim is for damages arising from torts, alleged to have been committed on the high and open seas by the master to the promoter, a passenger on board his ship, on her voyage from Dublin to Quebec. These torts are alleged to consist: 1. In causing one of the two fire-places for the use of the passengers to be thrown overboard during the voyage, in consequence of which, and of the scarcity of fuel, the promoter could, with great difficulty, get but one meal of victuals dressed daily. 2. In reducing the allowance of the promoter and his family, consisting of nine persons, from three and a half to two gallons of water per day. 3. In obliging the promoter and his fellow-passengers to work the vessel and to keep watch at night, in consequence of there not being a sufficient number of seamen on board. 4. In assaulting, beating, and putting in irons the promoter, during the voyage, without any sufficient reason.

The proceeding here I understand not to be in law founded upon the contract, but upon the tort. The sailing with passengers without having the quantity of water prescribed by the statute, subjects the master to a penalty; and the infliction of this penalty does not take

away from the passenger his right of action for the breach of the contract, which right of action is expressly reserved by the 17th section of the Passengers' Act (*a*). But this being a contract upon land, to be executed upon the sea, I think, as advised at present, that the remedy of the passenger upon the contract is exclusively with the common law courts. It does not thence follow that the passenger has no remedy in the Admiralty (*b*). The relation of master and passenger produces certain duties of protection by the master, analogous to the powers which the law vests in him over all the persons on board his ship; any wilful violation of which duties, to the personal injury of the passenger, entitles the latter to a remedy in this Court, as for "a cause of damage," a plea, or querele arising on the high seas. It is material to bear this distinction in mind in looking at and weighing the evidence in this cause. If this Court entertained the present suit as an action of damages founded directly upon the contract, it would be sufficient for the party complaining to prove the contract, and the breach of the contract by the master, to entitle the passenger to his damages, without reference to the *animus* of the master in the acts or defaults complained of. Looking at the liability of the master in this Court, as arising from a tort committed on the high seas, the *animus* of the master, and all the circumstances of the alleged breach of his duty of care and protection of the passengers, as master, come to be material in the determination of the question of his liability as for the tort: and this brings us to the examination of the facts of the case as disclosed in the evidence.

FRIENDS.

The testimony is somewhat contradictory; and as to the quantity of water on board the vessel, obscure and uncertain. The master could have no interest in sparing

(*a*) 5 & 6 W. 4, c. 53. (*b*) The Ruckers, 4 Rob. 53, 73.

FRIENDS. the allowance of water to the passengers, nor any other motive than that of economizing this essential requisite for life, for the benefit of the passengers themselves. The mate swears positively to the propriety of the diminution of the allowance of water; and this Court will not lightly question the judgment of the master and officers of the vessel, in a matter wherein he is solely responsible, and of which he, under all the circumstances, was the best judge. It may be that the master has rendered himself liable to the penalty of the law, for not having the prescribed quantity of water on board his vessel when she sailed. It may also be, that in an action on the contract he would be liable in damages to the passenger. But the question in this case is, whether he has been guilty of a tort, and personal wrong to the passenger; and without having any opinion as to his liability, either for the penalty or for damages by reason of the breach of the contract, I am decidedly of opinion that the evidence does not fix liability upon the master as for a tort. The same considerations apply to the fact of the throwing overboard of one of the fire-places. Where acts are done apparently in good faith, for the safety of the lives of the crew and passengers, — which are in the keeping of the master, — and where there is no appearance of any malicious or improper motive in the master, the Court will feel it to be its duty to support him.

The next charge is the master's compelling the promoter to keep watch and work on board the ship. Although in cases of necessity it may be competent to the master to compel passengers and all others on board the ship to labour for her preservation, yet that necessity must be clearly made out. The evidence upon this point is so contradictory, that I am unable to say whether such necessity existed or not; or whether the keeping of watch was compulsory on the passengers, or proceeded

from their own free will, and from their conviction of the necessity of the measure for the safety of all on board the ship. FRIENDS.

As to the last remaining ground of complaint, that is, the having assaulted the promoter and put him in irons, and kept him there for an hour, the fact is not denied, and the justification set up by the defendant has not been proved. The defendant pleads "that the promoter was frequently quarrelsome and disorderly, and bore a bad character among his fellow-passengers. That on the third day of May, the promoter created a great disturbance in the said barque, and struck and otherwise beat and maltreated one John Craig, a quiet, respectable man, and a passenger on board the said barque; and resisted the orders of the mate, who commanded the promoter to keep quiet and cease fighting; and thereupon, on the complaint of the passengers, and at their request, the defendant caused him to be brought on deck and handcuffed, and placed to the lee of the round-house, and there kept and detained for the space of half-an-hour. That the punishment inflicted by the defendant on the promoter was necessarily inflicted, to prevent the promoter in his anger from doing further mischief and injury to his fellow-passengers; and also for the sake of example, and to preserve discipline on board the said ship, and was not attended with cruelty of any kind whatsoever." The deposition of John Craig, produced by the defendant, and whose testimony is clear and unbiassed, shows that the promoter had been provoked by an act of aggression of Craig himself, and that the retaliation, though not strictly justifiable, was natural, and not accompanied by any act of cruelty or gross violence. It was the duty of the master on this occasion, —before inflicting any punishment whatever,—to have heard what the promoter had to say in his justification, which he does not appear to have done. In all cases

Tuesday, 18*th July*, 1837.

ATLANTIC—HARDENBROOK.

Abandoning seamen, disabled in the service of the ship, without providing for their support and cure, equivalent to wrongful discharge.

ATLANTIC.

JUDGMENT.—*Hon. Henry Black.*

This is an action for subtraction of wages. The promoter entered on board the barque Atlantic, as a cook, at Liverpool, on the 6th of March last, and signed articles on a voyage to Londonderry and Quebec, and thence back to a port of discharge in the United Kingdom. After the arrival of the vessel at Londonderry, he went on shore one evening with some of the passengers and got drunk, and returned at about half after six o'clock the following morning, and after the mate had directed another man to light the fires. Angry words passed between the mate and the promoter, and in going between decks the promoter fell or was pushed from the stanchion, and was so much hurt thereby that he was on the next day sent into the hospital, where he remained some twelve or fourteen days, and was then sent over in a steamer to Liverpool, where he was placed in an hospital in which sick seamen are received gratuitously. The exact period of time that he remained at this last hospital does not appear, but he shipped at Liverpool on the 13th of May, for this port in the Mary, and arrived here on the 19th of June last. On leaving the hospital at Londonderry, the master paid the promoter 1*l.* 5*s.* 3*d.* sterling. The wages which he was to receive in the Atlantic were 3*l.* sterling per month; and he appears to have received in the vessel wherein he sailed to this port 2*l.* 15*s.* per month.

LYDIA.

judged of by the Court, which should "be evident, strong, and legally important." In this case there can be no question of the right of the master to return him to his first situation in the ship, under the circumstances of an attempt to elevate him, which his own incapacity and misconduct defeated. His pretension for mate's wages from the time of his appointment to the end of the voyage, is altogether untenable, and must be dismissed. Per Judge Hopkinson, in the case of the Nimrod, Gilpin's Reports of Cases in the District Court of the United States for the Eastern District of Pennsylvania, p. 88.

LONDON.

a *quantum meruit*, I could not have sanctioned charges like those contained in this bill, which purport to be predicated upon that table, and are exceedingly exorbitant. The whole amount of salvage found to be due is 41*l.* 1*s.* currency. The proceedings in the cause consist simply of an affidavit and arrest, tender of this amount, and acceptance of it; and the fees claimed for the proctor of the petitioners, registrar and marshal, upon these summary proceedings, are 70*l.* 12*s.* currency. If there had been a legally established table sanctioning such charges, they would have been vested rights, which I should not have touched. As it is, feeling that I have no power to award fees in this case, I must,—however I may regret the inconveniences, to which the officers of the Court are thereby subjected,—confine myself to the allowance of the 4*l.* charged in the bill for necessary disbursements, and dismiss the petition as to the remainder of the prayer (*l*).

(*l*) A new table of fees was established by an Order in Council, bearing date at the Court at Buckingham Palace, the 2nd of March, 1848.

NELSON VILLAGE.

naval surveying service in the river St. Lawrence, then said—"I observe that it is established in evidence, that the weather was clear, the wind moderate, and the vessels mutually and plainly in sight of each other. I am therefore of opinion, that the exercise of a common degree of prudence and precaution would have prevented the collision, and consequently that the injury complained of cannot be considered as the result of accident. It is a rule universally received among seamen, and to be found in books on seamanship, that when there is doubt, the vessel upon the larboard tack is to bear up or heave about for the vessel upon the starboard tack. If, therefore, the vessels met, as alleged by the witnesses in support of the libel, the Nelson Village was bound to bear up and go to leeward of the Scotia, and nothing but inability to do so could relieve the Nelson Village from the fault of causing the injury done to the Scotia. But it is alleged by the sole witness on the responsive plea, that the Nelson Village was obliged to tack on account of being so near the Isle Bellechasse that she could proceed no further without running aground, that she was tacked in consequence, and that when she came round, and before she could get her sails filled with the wind on the larboard tack, the Scotia ran foul of her. Now, if the correctness of this statement could be admitted, it would follow that the Scotia ought to have tacked when she perceived the Nelson Village in stays, or in the act of putting about. But I cannot receive otherwise than with great caution the evidence of this witness, who was the prentice pilot in charge of the Nelson Village at the time of the collision, and consequently a party implicated. I will, therefore, briefly examine and compare his evidence with that of the witnesses in support of the libel. In the first place, two out of the four of those witnesses allege that the collision took place near the middle of the river, and consequently not near the Isle Bellechasse,

THE TORONTO.

promoter and Mr. Scriven, retired below, to speak together upon the occurrence which had just happened. Mr. Tylden returned to the deck, and addressing Mr. Scriven, requested him to come down; and as Mr. Scriven was in the act of descending the companion stairs, the promoter came round to go down before, and the defendant opposed his going down, saying, "you shall not go down, Sir;" upon which the promoter answered, "I will, Sir;" and was in the act of descending, when the defendant pushed him in the corner of the companion, and seized hold of him to prevent him from going down into the cabin; at which moment Mr. Moor, the mate of the ship, and Mr. Kent,— who was coming out in the ship to take the command of her here after her arrival, and has since done so,—came up and laid hold of the promoter by the arms, but desisted upon the remonstrance of Mr. Scriven; and the promoter, then extricating himself from the defendant, went into the cabin. The defendant followed him into the cabin, insisted upon being present, but did not subsequently renew his assault upon the promoter; and it is therefore not necessary to state what occurred in the cabin, except to say, that the passengers came to the resolution of not speaking to the defendant during the remainder of the voyage, upon his refusal to apologize to the promoter. The promoter, upon being applied to respecting the nature of the apology, expressed himself ready to accept any apology which met the approbation of Lieutenant Tylden and Mr. Cusack.

The witnesses offered on the part of the defence were Mr. Kent, Mrs. Barnard, a lady who was a passenger on board the vessel, and Mr. James Moor, the mate. The testimony of Mr. Kent, and Mr. Moor, contains an account of a conversation between the passengers upon the quarter deck, immediately before the defendant's coming up and prohibiting them from proceeding with

THE TORONTO. the game; the defendant being at the time of this conversation within the hearing, but not in sight, of the parties to it. The Toronto at this moment had not much sail set, the crew being engaged in shifting her sails, and bending new sails in lieu of the old ones, which she had been down to that time carrying. A vessel passing in full sail at this time, Mr. Tylden observed to Mr. Kent that he, Mr. Kent, would have topgallant sails enough to use going home, as the defendant did not seem to intend to use them on the voyage out; to which Mr. Scriven added that the Toronto was a good ship, but badly commanded, according to Mr. Kent's statement; but according to Mr. Moor, the passengers said that certainly the ship was a good ship, without his hearing them speak of the master. He heard them say that the sails and rigging were bad, and he understood, from the way they spoke, that their conversation implied that the fault was in the defendant, as he did not carry more sail. Neither of these witnesses say that the promoter individually took any part in this conversation. Both concur with the witnesses for the promoter, in stating that the defendant denied to the promoter the privileges of a cabin passenger, and that he pushed the promoter, ordering him off the quarter-deck; that he afterwards attempted to hinder the promoter from going into the cabin, by standing in his way, and holding him by his clothes. The conduct of the promoter, as represented by these witnesses, upon his right to be on the quarter-deck being denied by the defendant, was less temperate than it is represented to have been by the promoter's witnesses. Mr. Moor says, that upon Mr. Tylden's saying he supposed they would not be allowed to walk the quarter-deck, the promoter took it up, and stamping upon the deck, and swinging his hand within a foot or eighteen inches of the defendant's face, said that he had paid his passage in the ship, and would do as he thought proper.

the word, will, it seems, justify a captain of a ship in excluding a passenger from the cuddy table, whom he has engaged by contract to provide for there; but it is difficult to say in what degree want of polish would, in point of law, warrant such exclusion; but it is clear that if a passenger use threats of personal violence towards the captain, the captain may exclude him from the table, and require him to take his meals in his own private apartment. Prendergast *v.* Compton, 8 C. & P. 454. (Tried before Tindal, Ch. J., 21st Dec. 1837.)

THE TORONTO.

The Admiralty entertains jurisdiction of personal torts committed by the master on a passenger. In the case of The Ruckers, a civil suit for damages was brought in the Admiralty, for an assault by the master of the ship on a passage on the high seas, and on full consideration the jurisdiction was sustained. Lord Stowell said, "Looking to the locality of the injury, that it was done on the high seas, it seems to be fit matter for redress in this Court." 4 Chr. Robinson's Rep. 73.

Saturday, 16*th June*, 1838.

FACTOR—PRICE.

FACTOR.

The detention of a vessel during the winter by stranding in the River St. Lawrence on her voyage to Quebec, where she arrived in the succeeding spring, does not defeat the claim of the seamen to wages during the detention.

JUDGMENT.—*Hon. Henry Black.*

The promoter shipped as a mariner on board the schooner Factor, on the 26th January, 1837, on a voyage from the port of London to the port or place called Coast Castle, in Africa, thence to the Island of Madeira, and thence back to the port of London at the rate of wages of 1*l.* 5*s.* per month. The schooner accordingly proceeded from London to Coast Castle and thence to the Island of Madeira, where her cargo was discharged and another taken in; with the cargo thus taken in at Madeira, instead of returning to the port of London she proceeded on a voyage to this port. On her way up the St. Lawrence, in the month of November last, she took the ground at Millevaches, about 150 miles below Quebec; and being situate in the tide-way, and immoveable, was there exposed to the full force of the drift-ice, which was then beginning to form in great masses. It being the opinion of the master and crew that the schooner was in imminent peril of being carried away and destroyed by the ice, they removed to Green Island, where they passed the winter. In the course of the winter the promoter was sent by the master to Quebec, and put into the Marine Hospital to be treated for a wound or sore occasioned by his being frostbitten whilst in the service of the schooner. Contrary to the expectations of the master and crew the

out of her course; and yet that was never pretended. Instances of such interruptions frequently occur in voyages from the north-west parts of this kingdom to Ireland; sometimes ships are driven by the violence of the winds to the ports in Denmark, where they have been obliged to winter." In another case, Beystrom *v.* Mills (*e*), Lord Eldon says, "There is no doubt that if a ship does not perform her voyage, the sailors have no title to wages; the policy of the law has said so, as the means of making it the interest of the sailors to preserve the ship; but it is equally certain, that if the voyage is performed, a temporary interruption shall not defeat the claims of the seamen." These cases sufficiently establish the general principle, and its application to cases much less favourable to the claim of the seamen than the present one; indeed, Lord Brougham, arguing as counsel for the seamen in the case of the Russian embargo, before the House of Lords, puts the very case now before the Court as one where the claim of a seaman was undoubted, and upon this point he is not contradicted. "The vessel," he says, "might be detained for weeks and months by stress of weather, as in the case of a ship frozen up, and the mariners taken out and removed to a distance of some miles, and yet the claim for wages would be good" (*f*). Upon the whole I entertain no doubt that the law in this case is with the promoter, and I accordingly decree to him his wages from the time of his shipping himself in London, down to the time of the arrival of the schooner in the port of Quebec, being the whole sum demanded.

Maguire, for the promoter.
Duval, Q. C., contra.

(*e*) 3 Espinasse's, N. P. C. 37. (*f*) 1 Dow. 309.

LORD JOHN RUSSELL.

the Lord John Russell. That, notwithstanding that the crew of the Robert Kerr used their utmost exertions to separate the vessels, and veered out the cables and dropped clear of the Lord John Russell, the Lord John Russell immediately fell on the larboard side of the Robert Kerr, and was held on by the said Robert Kerr until the Lord John Russell hove up her anchor to see if the Lord John Russell could get clear; but that the Lord John Russell, after remaining there for some time, again let go her anchor, which caught one of the anchors or chains of the Robert Kerr, and caused both ships to drive and continue to do so until they got past the barque Baltic Merchant and brig Forrester. The collision, it was alleged in the libel, occurred wholly through the inattention and want of skill of the persons on board the Lord John Russell, and not from any inattention or want of skill of the persons on board of the Robert Kerr. The libellant, in conclusion, specified the injuries done, and stated the damages at 500*l.*

The responsive allegation given in by the owner of the Lord John Russell pleaded that the Lord John Russell being in ballast, bound to this port, rounded Point Levi, on the 27th of May last at about half-past nine at night, under a stiff breeze from the north-eastward; that all sail was then taken in and close hauled with clue line, bunt lines, and reef tackles, as is usual when ships are coming to anchor; and that in about half an hour the pilot Guillaume Lebel, ordered the anchor to be let go, which was accordingly done, and forty-five fathoms of chain run out. That the port of Quebec was then crowded with vessels, and the weather rather dark; and that none of the vessels there, and more particularly the Robert Kerr, showed lights of any kind, as required by the regulations of the port. That the Lord John Russell dragged her anchor some distance, and was at last brought up in the hawse of the Robert Kerr; that the boat of the Lord John

LORD JOHN RUSSELL.

not sheer: that the ebb tide, by this time, having made out strong, and the Robert Kerr being loaded and heavy, and being in advance of the Lord John Russell, both vessels drove right to windward; and while driving the master of the Robert Kerr became for the first time a little alarmed, and desired the master of the Lord John Russell to let go his anchor again, in order to prevent driving further, which was immediately complied with, and seventy fathoms of chain veered out; that this anchor being insufficient to stop the progress of the two vessels, the master of the Robert Kerr desired the master of the Lord John Russell to let go a second anchor, which was done with sixty fathoms of chain, but to no purpose, —as the ship still drove in an unmanageable position,— until they drove upon the brig Forester, by which the jib-boom of the Robert Kerr was carried away; the two vessels then drove onwards until brought up by the barque Baltic Merchant: that being then unmanageable, and the wind being high, they received much damage in their hulls, spars, and rigging, by damage-collision one whole tide: that it was fully in the power of the master of the Robert Kerr to have let out more chain when first desired to do so, and that if he had done so, all damage and loss to the said vessel would have been avoided, inasmuch as though at that time the boat hanging at the stern of the Lord John Russell had been injured, no injury whatever had been done to the Robert Kerr; and that at the same tide, and nearly at the same place, the ship Ocean was driven by stress of weather from her moorings and sent ashore in the river St. Charles.

From the evidence it appeared that in the afternoon and evening of the 27th of May last, the Robert Kerr was moored with two anchors, opposite the India wharf in the harbour of Quebec, and that the Lord John Russell coming into the harbour from sea, with a flood tide and a fresh wind from the eastward,—the night being sufficiently

Lord John Russell.

the owner of a ship doing damage to another is liable, though the ship was in charge of her pilot. The principle appears to be that the pilot is substituted in the place of the master, and the master ceases therefore to be liable as master, but the owners remain answerable for the conduct of the new temporary master,—the pilot,—in the same way, and to the same extent, that they were answerable for the conduct of the master himself, so far as the navigation of the ship is concerned. Chancellor *Kent*, to whom the science of the law is so much indebted, recognises, in his Commentaries on American law, the principle so clearly laid down by Lord *Stowell*. "It may be here observed," says Chancellor *Kent*, "that it is the duty of the master engaged in a foreign trade, to put his ship under the charge of a pilot, both in his outward and homeward voyage, when he is within the usual limits of the pilot's employment. The pilot when on board has the exclusive control of the ship. He is considered as master *pro hac vice*, and if any loss or injury be sustained in the navigation of the vessel while under the charge of the pilot, through his default, negligence, or unskilfulness, the owner would be responsible to the party injured for the act of the pilot, as being the act of his agent. Some doubt has been thrown on the point by a dictum of Ch. J. *Mansfield* in Bowcher *v.* Noidstrom (*i*), but the weight of authority, and the better reason is, that the master in such a case, would not be responsible as master, though on board, provided the crew acted in regular obedience to the pilot" (*k*). Mr. Justice *Story*, who has enriched the maritime jurisprudence of the United States with so many valuable decisions, admits, in his edition of Lord *Tenterden's* work on shipping, the authority of the two foregoing cases (*l*), and Mr. Bell, whose work on commercial law occupies so high a place, says:—

(*i*) 1 Taunt. Rep. 568.
(*k*) 3 Kent's Com. 135.
(*l*) Abbott on Shipping, p. 210, in note.

LORD JOHN RUSSELL.

NOTE.—In April, 1853, on appeal to the Circuit Court of the United States for the third circuit, in the case of The Creole, a British ship bound out, and in charge of a licensed pilot, the Court reversing the judgment of the District Court, held that the owner was not released from responsibility, in a case of collision, from the circumstance of having a pilot on board. Mr. Justice *Grier*, in delivering the opinion of the Court in that case, thus stated what is the American maritime law upon the subject:—

The position assumed on behalf of the ship, and by which it is sought to cast the responsibility on the immediate cause of it,—the pilot,—raises a question of vast importance in its bearing on our bay and river navigation. In most, if not all the ports of the United States, the laws for licensing and regulating pilots are enacted by the different States in which the ports are situated: and however variant they may be in their details, they generally require a vessel entering or leaving a port, to employ a licensed pilot. The persons licensed are seldom of sufficient property to respond to damages for their acts of negligence, nor are they required to give security to a sufficient amount to meet such responsibility. If the colliding vessel be discharged from liability, while under the direction of a licensed pilot, and recourse for the injury can be had against the pilot alone, the injured party will, in most cases, be wholly without remedy.

It is a violent presumption against the validity of this defence, that in the numerous cases of collision daily occurring in the United States, in many or most of which, no doubt, the vessels have been under the control of licensed pilots, the owners have not endeavoured to avail themselves of it. Nor has the learned counsel for the respondent, with all his research, brought to my notice a single case in the common law or admiralty courts of the United States, where the defence has been held available.

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before Chief Justice *Mansfield* in 1809, that this notion that a licensed pilot was not considered a servant or agent of the owner, had obtained no place in courts of justice; for the Chief Justice held the *master* liable, on the assumption that he represented the ship or owners; and the case was reversed, not because his legal position was incorrect, to wit, that the ship or owners would have been liable for the act of either master or pilot, as their servant; but because one servant was not liable for the act of another, who was not his subordinate. The case of Fletcher *v.* Braddick (*r*), though not directly in point, seems not to recognise the same principle. In cases of collision, the injured party has a remedy by action at common law, not only against the owners, but the master. And although the master of the vessel is the servant of the owners, and they are liable for his acts in the course of his employment, he is an exception to the general rule, that the remedy of third persons for the servant's acts of negligence is only against the master. As the pilot, when on board, has the absolute and exclusive control of the ship, the *master* might well defend himself against liability for the acts of one over whom he has no control or authority. Therefore by the maritime law the *master* is not held liable for the acts of mariners, who are not of his own choosing, and who are not acting under his orders (*s*). The pilot is for the time master of the vessel, and substituted in the place of the captain, with the same duties and responsibilities. But it is far from being so clear as a principle, either of maritime or common law, that the *vessel or the owners* are discharged from responsibility for the same reason.

Pilot laws are intended not to burthen commerce, but for its benefit and safety. As a general rule, masters of vessels are not expected to be, and cannot be, acquainted with the rocks and shoals on every coast, nor able to

(*r*) 5 Bos. & Pul. 182.

(*s*) Molloy, B. 2, c. 3, sec. 12.

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selected for them by persons more capable of judging of his qualifications, cannot alter the relation which he bears to the owners. He is still their servant.

The Court of Exchequer in the case of The Attorney-General *v.* Case (*t*), confirm what I have said, that before the Pilot Act of 52 Geo. 3. (1812), the owner was held liable for the act of the pilot as his servant. They decided also, that the Liverpool Pilot Act was not compulsory or penal, though it required the vessel to pay the pilot's wages, whether it employed him or not. In the case before us the master may decline the services of the pilot, by paying half his wages. I am well aware that Dr. Lushington, in the case of the Maria (*u*), which arose on the Newcastle Pilot Act, has given a different construction to the Liverpool Pilot Act, because it uses the words "*oblige and require.*"

The English cases on the subject since 1812 cannot be reconciled with one another, and have not been adopted as precedents here. On the contrary the case of Bussy *v.* Donaldson, from which I have quoted the opinion given by Chief Justice *Shippen*, has been adopted as founded on the sounder reasoning (*x*). And in 1847, quite independently of that precedent, and without the least reference to it, the Supreme Court of Pennsylvania again interprets the statute before us in the same way as he did the one before him, in this respect, exactly like it (*y*).

They say, "The legislature have wisely decided not to *compel* the owners to employ a licensed pilot, but have permitted them, if they please, to compound by paying half pilotage, for the benevolent and beneficial purpose of relieving distressed and decayed pilots, their wives and

(*t*) 3 Price, 302.

(*u*) 1 W. Robinson, 95.

(*x*) Yates *v.* Brown, 8 Pickering, 23; Williamson *v.* Price, 16 Martin, 399; 3 Kent's Com., 175-6.

(*y*) Flanigan *v.* The Washington Insurance Company, 7 Barr. 31.

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By these the master was authorised to bind the vessel by bottomry. And by these the vessel becomes hypothecated for the obligations of the master arising *ex delicto*, and is herself treated as the debtor or offender. Hence, also, the vessel becomes bound to those who dealt with the master, whether he was appointed to act as their agent, or the ship was let to him on charter party. It is unnecessary to make an array of the various European writers on this subject, as authority for these statements: I refer for them to the opinion of Judge *Ware*, in the cases of the Spartan, the Rebecca, and the Phœbe (*z*), in which the origin and principles of maritime law affecting the liability of vessels for contracts of the master are treated with the ability and research which distinguished that Judge.

It would seem to follow from these principles, that third persons who may be supposed to be ignorant of the owners, have a right to treat the vessel as primarily liable, *ex delicto*, for the acts of the owner, who has the legal possession and control of her movements. The pilot is master for the time being—as such, also, he is legally in possession, acting for the owners, and in their service. The law which hypothecates the vessel for negligent or wrongful acts of her commander, does not stop to inquire as to the mode of his appointment, or the motives or degree of consent which accompanied it.

It is in accordance with these principles that the case of the Neptune the Second (*a*) was decided by Sir William *Scott*, in 1814, two years after the passage of the Pilot Act of 52 Geo. 3, already referred to. It is supposed by Dr. Lushington (*b*), that the learned Judge overlooked the provisions of that statute; but as a true statement of the maritime law unaffected by statute regulations, it has

(*z*) Ware, 138, 188, 263, &c.
(*a*) 1 Dodson, 467.
(*b*) 1 W. Robinson, 49.

Thursday, 20th September, 1838.

DELTA—MURRAY.

Attachment decreed for contempt in obstructing the marshal, in the execution of the process of the Court.

Per Curiam.

In this case it is stated in the affidavits that the master of the brig Delta had obstructed the marshal in the execution of the process of the Court, and had weighed anchor after the vessel had been regularly attached in this cause, with the intention of proceeding to sea, and was only prevented from doing so by a naval force acting under the authority of the marshal of the Court. The Court decreed a monition to show cause why an attachment should not issue for a contempt (*a*). This monition having been regularly served, and the master not showing any cause, it remains only to order the attachment to issue (*b*).

Maguire, for the promoter.
Gairdner, for the master.

(*a*) 1 Rob. Ad. R. p. 331.

(*b*) When a vessel under arrest for bail to the amount of a part owner's interest, and after commission to take bail, at the instance of the master—the other part owner—had issued, was removed by the master and others, to Jersey, the High Court of Admiralty decreed an attachment against the master and mate for their contempt (and they were imprisoned), and a monition against others to show cause. —The Petrel, 3 Haggard, 299.

against whom it is made, within the body of the district (*a*). The remedy must be at Common Law: this Court has no jurisdiction over it (*b*). Motion rejected.

Gairdner, for the owners of the Romulus.

(*a*) Hamilton *v.* Fraser, George Okill Stuart's Lower Canada, Rep. p. 21, 36, *et seq.*

(*b*) See Barnes's case, 2 Roll. Rep. 157, cited in 1 East's Rep. 308. On a return to a *habeas corpus*, it appeared that Barnes was imprisoned by the Court of Admiralty until he should pay 40*l.* or restore an anchor he had taken.

AID.

Oughton for such amendment, reference is specially made to the process and proceedings in the cause showing the error. The concluding words in the allegation are—*prout ex processu, et cæteris actis judicialibus, in hâc causâ, habitis, ad quæ me refero, liquet et apparet* (*c*). And Clerke, in treating of amendments, lays down the same rule. In this case there is nothing to justify the substitution of the name Eight in the place of the name Aid in the warrant. The surmise by the party to the officer referred to in his return is of itself no evidence of authority, and is besides directly contrary to the affidavit upon which the writ issued; for, the name of the ship in the warrant corresponds with the name in the affidavit. The party, therefore, can take nothing by his motion. The case of the Thomas Gelston (*d*) has been cited at the bar in support of the present motion. But in the amendment ordered by the Court in that case, the Court had the admission of the party defendant in the cause that his name was Robert, and that he had been impleaded by the name of John; and, not having appeared under protest, he could not avail himself of this irregularity for the dismissal of the action. Upon examination of the record in that case, it will be found that the amendment ordered by the Court was confined to the giving of conformity to the whole proceedings, by substituting in the place of John and of Robert, the words, "Robert impleaded by the name of John." No practical inconvenience could arise from the allowance of amendments within the limits stated by Oughton and by Clerke; but if the liberty of amendment were carried to the extent here asked for, it would be competent to an individual upon an affidavit of debt against one ship, and a warrant sued out against that ship, to attach any ship he thought proper, and by amending the warrant, upon his mere surmise made to

(*c*) Ordo Judiciorum, Tit. 59, s. 5. (*d*) MSS., 12th July, 1837.

AID. the officer, to render the attachment efficacious against such other ship without any affidavit (*e*), or any warrant against her; a proceeding that it is impossible this Court could lend its aid to.

(*e*) See Rules and Regulations of the Vice-Admiralty Courts, § 7.

Thursday, 15*th November*, 1838.

JOSEPHA—McINTYRE.

JOSEPHA. Suppletory oath ordered in a suit for subtraction of wages.

Per Curiam.

In this case the evidence of the period of service as well as of the particular articles of clothing in the promoter's chests, is not sufficiently precise, and the master of the ship has sailed from this port since the attachment of the ship, without producing or leaving the ship's articles. I shall, under these circumstances, order the suppletory oath to be administered to the promoters (*a*).

Maguire, for the promoter.
Anderson, contra.

(*a*) Bro. Civ. & Ad. Law, 385; Heineccius in Pandectas, Part iii., s. 28; Arn. Vinnius, Select. Jur. Quæst. Lib. 1, cap. 43, p. 112; Huber ad Pandectas, Lib. 12, Tit. 2, s. 12.

Tuesday, 20th November, 1838.

CAPTAIN ROSS—MORTON.

CAPTAIN ROSS.

Seaman going into hospital for a small hurt, not received in the performance of his duty, not entitled to wages after leaving the ship.

JUDGMENT.—*Hon. Henry Black.*

This is a suit brought for subtraction of wages under the following circumstances. The promoter shipped as steward on board the barque Captain Ross, Digby Berkeley Morton master, on the 27th of April last, on a voyage from Liverpool to Montreal, or any other ports in British North America, and back to the port of Liverpool, or any other port or ports in Great Britain or Ireland, at the rate of 2*l.* 15*s.* sterling, per month, and received one month's pay advance. The promoter served on board the ship from the time of his shipping down to some days after the arrival of the ship at Montreal, in the early part of June last. He then complained of having a sore small toe, and wished to go into hospital; upon which the master sent for a surgeon, who after examining the toe was of opinion that amputation was the most effectual means of relief; and the next day was appointed for the operation. The promoter, however, swerving, the operation was not performed, and he left the ship—without notice to the master or his consent—and went into the General Hospital at Montreal, where he appears to have remained from the 8th of June to the 5th of July, during which time his toe was taken off. In the meantime the vessel sailed on her return voyage, and the promoter afterwards came to Quebec, where he has since remained; and on the return of the ship to this port, in the month

of October last, attached her for his wages. It appears that he had had his toe frostbitten about two years before this, on board of some other vessel, and it was to this cause he attributed his having this sore toe. CAPTAIN ROSS.

By the law of England and of the other maritime countries of Europe and America, the whole wages are given to the seaman, even when he has been unable to render his service, if his inability has proceeded from any hurt received in the performance of his duty or from natural sickness happening to him in the course of the voyage (*a*). But even in this case the seaman is not justified in leaving the ship and going into hospital, unless the sickness or hurt be sufficiently serious to justify such course. In this case the hurt complained of was not received in the performance of the promoter's duty, but anterior to his entering into the service of the ship; and did not, as appears from the evidence in the cause, require his leaving the ship. It was his duty at least to have given notice to the master before going to hospital. It was his business also—if the case had been such as to justify his remaining here during the period he was in hospital, and proceeding against the ship as upon a continuing engagement down to the time of his return to the port of shipment—to proceed to that port in another ship, upon being in a condition to do so. In which case the wages which he would have earned on the return voyage would go in deduction of his claim against the barque Captain Ross; and it appears here that he might have earned on such return from 4*l.* to 5*l.* per month, being nearly double the rate of wages which he was to

(*a*) Abbott on Shipping (Mr. Justice Story's edition of 1829), p. 442; Chandler *v.* Grieves, 2 Hen. Black. 606, note (*a*); 2 Boulay Paty, 232; Poth. Louage des Matelots, No. 189; Orde. 1681, Liv. iii. Tit. 4, art. 11; 1 Valin, 721; Sir James Graham's Act, 5 & 6 Will. 4, c. 19, s. 18; The Atlantic, 18th July, 1837, *ante*.

Tuesday, 16th April, 1839.

SOPHIA—WEATHERALL.

Where a voyage is broken up by consent, and the seamen continue under new articles on another voyage, they cannot claim wages under the first articles subsequent to the breaking up of the voyage.

Defendant's bail is an incompetent witness.

Receipt in full is not taken as conclusive in this Court.

JUDGMENT.—*Hon. Henry Black.*

The brig Sophia, whereof the defendant was master, sailed from Liverpool in the month of September last, on a voyage to Quebec, or any other port or ports in British America, at the option of the master, and back to the port of Liverpool or any other port of discharge in the United Kingdom; and the promoter, a carpenter, with the rest of the crew, signed articles accordingly. The vessel having arrived at Quebec in the month of October of the same year, and the owner being desirous of sending her to Shediac in the Gulf of St. Lawrence, to convey troops thence to Quebec, and conceiving that he was not entitled, under the articles, to take the vessel to this port, called the crew together and gave them the option of being discharged from the articles and returning to England, or of going to Shediac under the articles. The promoter and two others of the crew accepted the latter option, seven of the original crew adopted the former. The voyage in the second articles is "from the port of Quebec to Shediac or any port in the Gulf St. Lawrence and back to Quebec, employed in the transport service." This voyage was accordingly performed by the promoter, and on the return of the vessel to Quebec, she was dismantled and laid up for the winter, the promoter working at the

SOPHIA.

dismantling of her, and upon this being completed he received from the owner wages and boarding down to this period. But the claims of the promoter goes further, and he insists that he is entitled to wages and boarding up to the 7th of May next, amounting to 37*l.* 10*s.* after giving credit to the defendant for 15*l.* This claim proceeds upon the principle that the promoter, notwithstanding the change in the voyage, continued to be in the service of the ship under the original hiring. I cannot consider that he was so. The master notifies the seamen that the original voyage was broken up. The whole crew, and the promoter with the rest, acquiesce in this. Undoubtedly they might have claimed to return to Liverpool, or some other port in the United Kingdom, and wages up to the time of their arrival as stipulated in the articles, allowing in deduction what they might earn. But as at that season of the year seamen could have no difficulty in obtaining a higher rate of wages than the rate of wages stipulated by the articles at Liverpool, this claim was fully answered by offering them their discharge, and if it were not, it was for them then to have preferred their claim against the ship. The conditions proposed by the master, upon breaking up the original voyage appear reasonable, and were consented to by the crew (*a*). The first voyage being thus determined at Quebec by consent, the second was determined at the same port by the articles, after which period the promoter could have no claim as for wages. I have not adverted to the receipt in full of all demands signed by the promoter upon receiving wages up to the time of the laying up of the ship in the port of Quebec; because the only evidence offered of its execution is derived from the testimony of the bail of the defendant, who is of course an incompetent witness; and at all events a receipt in full is open to

(*a*) The Elizabeth, 1 Dodson, 403.

explanation, and upon satisfactory evidence may be restrained in its operation. The fact of the payment of the money is established by other evidence, and by the admission of the promoter himself; and, taking the voyage to have determined under the second articles at Quebec—which I have already said I think it must be—the promoter has received all that he is entitled to under the articles. But the promoter seems to conceive himself entitled to board and wages subsequently to the determination of the voyage, on the ground that upon entering on the new engagement, the owner promised to find him employment during winter. There does not appear to me to be any evidence that the master or owner made any such agreement; and if such an agreement had been made, it would have been an agreement varying the contract of wages in the ship's articles of which parol evidence could not be introduced. Such a collateral engagement, too, if entered into and for a legal consideration, could not entitle the party to wages, but only to damages to be recovered in a court of common law for the breach of this convention. In this view of the subject, I decree that the promoter's suit be dismissed.

Maguire, for promoter.
G. Okill Stuart, for defendant.

Saturday, 26th December, 1840.

MARY CAMPBELL—SIMONS.

MARY CAMPBELL.

Vessels are required, of a dark night, to show their position by a fixed light while at anchor in the harbour of Quebec; and the want of such light will amount to negligence, so as to bar a claim for an injury received from other vessels running foul of them.

Master may avail himself of the wind and tide, and sail into port by night as well as by day.

By-Laws of Trinity House not abrogated by desuetude or non-user.

JUDGMENT.—*Hon. Henry Black.*

This is a claim for damages on the part of the ship Jamaica against the ship Mary Campbell, incurred in the night of the first of October last, in the port of Quebec, by running against the Jamaica through negligence or want of skill of the persons on board of the Mary Campbell. It is in proof that the collision took place between nine and ten o'clock at night, and that the night was dark, and at that time there was no moon above the horizon, and the wind was fresh, and the tide strong, running up the river; and the Jamaica was at anchor in the stream, and there was no light shown on board the Jamaica. It further appears that by the by-laws and regulations of the Trinity House, all ships or vessels, in dark nights, at anchor in the stream opposite the town must show a light on the bowsprit end on the flood tide, and at the mizzen peak or ensign staff on the ebb tide. It is also in proof by the testimony of the harbour master and a member of the Trinity House of Quebec, and of the superintendent of pilots, and also a member of the Trinity House, that every night is considered to be a dark night when the moon is not up; that an extract from the by-laws and regulations of the Trinity House is

given to every captain of a ship upon his arrival in the harbour of Quebec, and these witnesses have no doubt that the master of the Jamaica received one.

The above facts appear without the testimony of the master of the Jamaica or of the pilot of the Mary Campbell, and I am of opinion that the want of a light on board of the ship Jamaica, at the time of the collision, is fatal to the claim of the libellants for damages. The power of the Trinity House to make the regulation is not questioned, and the non-compliance with the by-law or regulation in respect to the light, by the master of the Jamaica, at the time and under the circumstances, was a negligence that creates a bar to the claim for damages. I consider the objection to be insurmountable, and that this single objection renders all the questions that might arise in the case of no consequence.

The by-law of the Trinity House I assume to be valid and binding, and founded on competent authority; and the suggestion that the non-user has destroyed the force and obligation of the rule is wholly groundless. There is no such principle in the English law that a a statute authority or direction can be repealed or lose its efficacy by non-user (*a*). The mode of abrogating or repealing statute law by desuetude or non-user is not only unknown to the English law, but would be pernicious and dangerous. The Court of King's Bench in White *v.* Boot (*b*) promptly discarded such a doctrine. Assuming then the existence, validity, and operation of the Trinity House regulation of the vessels in the harbour of Quebec, the master of the Jamaica was bound to take notice of it. The evidence of disinterested witnesses of credit and character goes to show that the master of the Jamaica was duly informed of the regulation, and was served with a copy of it. How then can

(*a*) 2 Dwarris, 672. (*b*) 2 T. R. 274.

MARY CAMPBELL.

light, in such a port as Quebec, and lying in the stream, with a fresh wind and tide up the river (*d*).

I do not perceive anything like negligence or want of skill on the part of the Mary Campbell, for she had a right to avail herself of the wind and tide, and sail into the port by night as well as by day. She appears to me to have been free from blame, and as I have already observed, the want of a light raises the inference of negligence on the part of the Jamaica, and that destroys the equity of the claim to any damages in the case of such an accident, arising from the darkness of the night: and when we recur again to the regulation of the Trinity House, the disregard of that regulation of law defeats the title to damages entirely (*e*).

(*d*) In reference to the rule existing in some ports, requiring lights to be hung out conspicuously in dark nights, it was said in Carsley *v.* White, 21 Pick. 154 (Massachusetts Reports), that there was no general and absolute usage on the subject, and that the omission of the light might or might not be a fatal negligence, according to the circumstances. But the Ch. J. of Pennsylvania in Simpson *v.* Hand, 6 Whart, 324, more justly considered that the hoisting of a light in a river or harbour at night, amid an active commerce, was a precaution imperiously demanded by prudence, and he did not see how it could be considered otherwise than as negligence *per se*.

(*e*) "That all ships or vessels, in dark nights, at anchor in the stream opposite the town, shall show a light at the bowsprit end with the tide of flood, and at the ensign staff or mizzen peak with the tide of ebb: and in default thereof shall incur a penalty not less than forty shillings, and not exceeding five pounds, to be paid by the master of such ship or vessel for every such offence."—By-laws, Rules, and Orders of the Trinity House, Quebec, of 28th June, 1805. Sec. 2, art. 4.

This by-law has since been repealed, and the following substituted for it:

"That the masters or persons in charge of ships or vessels at anchor in any part of the River St. Lawrence, between Green Island and the western limits of the port of Quebec, shall, during the night, cause to be placed on board of their respective vessels, a distinct light in the fore-rigging, twenty feet above the deck, under a penalty, for every neglect of this regulation, not exceeding ten pounds currency."—By-laws, Orders, Rules, and Regulations of the Trinity House of Quebec, of 12th April, 1850. Sec. 35.

Thursday, 18*th February*, 1841.

LEONIDAS—ARNOLD.

LEONIDAS.

In a cause of collision, where the loss was charged to be owing to negligence, malice, or want of skill; the Court, with the assistance of a captain in the Royal Navy, being of opinion that the damage was occasioned by accident, chiefly imputable to the imprudence of the injured vessel, and not to the misconduct of the other vessel, dismissed the owners of the latter vessel.

Rule of navigation when a ship is in stays, or in the act of going about.

JUDGMENT.—*Hon. Henry Black.*

This suit is brought by the owners of the ship Mary Ann Hutton, to recover the amount of certain damages sustained by that vessel from her being run foul of by the ship Leonidas, on the morning of the 1st of September last, off Point des Monts, in the river St. Lawrence, through the alleged negligence, malice, or want of skill of the persons on board of the Leonidas. The libel states that at one in the morning of the 1st of September, the Mary Ann Hutton was on the starboard tack (*a*), standing in towards the land at Point des Monts; that at this time or shortly after, the main sail of the ship was hauled up to enable her to stay with the watch then on deck; that while she was in stays, and was paying off without headway on her, the watch on deck saw the Leonidas on the lea beam of the Mary Ann Hutton, about three or four hundred yards from her and bearing down upon her; that the helm of the Mary Ann Hutton was then a-starboard, and that her mate hailed the Leonidas to starboard her helm and keep away, and that he was answered from the Leonidas, which vessel, however,

(*a*) This could not be, as Captain Bayfield remarks.

LEONIDAS.

continued her course, the wind being then west north west, and blowing a fine breeze, and the Leonidas going seven to eight knots an hour; that the Leonidas was repeatedly hailed from the Mary Ann Hutton, to *starboard her helm* (*b*) and keep away, but she did not, but on the contrary kept her luff, and struck the Mary Ann Hutton on the lee quarter, doing the damage complained of; that the Mary Ann Hutton, before and at the time of the collision, had a light conspicuously placed on her fore-stay, and that when she hailed the Leonidas, the master caused a lamp to be held up so that the people of the Leonidas must have seen it. On the part of the owners of the Leonidas it is alleged, in their responsive plea, that she was off Point des Monts, at one in the morning of the 1st of September last, the wind blowing then fresh from the west south west, and not from the west north west as alleged in the libel, and that the night was dark and hazy in shore towards the north of Point des Monts; that the Leonidas was then, and had been for an hour, standing on the starboard tack, out from the shore with nearly all sail set, and going about seven and a half knots an hour; that about two minutes or less before the collision, one of the watch of the Leonidas saw the Mary Ann Hutton on the lee bow of the Leonidas, and about one hundred or one hundred and fifty yards from her, at a great distance from the shore, and standing towards it, on the *larboard tack*, and not on the *starboard tack*, or in stays as alleged in the libel; that about that time the watch of the Leonidas heard a voice from the Mary Ann Hutton, calling out "put your helm up," and that the helm of the Leonidas was put up accordingly; that the Leonidas had a light on her fore-stay, but that the Mary Ann Hutton had not, though it is falsely alleged in the libel that she had; that at the

(*b*) That was to "put it up" as the Leonidas people say also, that they were told to do.

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time of the collision the Mary Ann Hutton had not her main sail hauled up, that she had her larboard tacks on board, and was not in stays, but that her main sail was set, all her yards the same way, that her sails were full and that she had way on her larboard tack; that the Leonidas being on the starboard, and the Mary Ann Hutton on the larboard tack, the latter was bound to give way; and that the collision did not occur by the inattention, neglect, nor want of skill on the part of those on board of the Leonidas, but by the negligence or want of skill of those on board the Mary Ann Hutton.

There are some contradictory statements made by the witnesses examined in the case, as there are and indeed must almost necessarily be in cases of this kind, and as to circumstances occurring in the darkness of night, and amidst inevitable confusion, and with regard to which the feelings of the witnesses on each side are strongly excited in favour of the views most favourable to their own vessel; but by a careful examination of the whole evidence, the facts appear to have been as follows:—

At the time mentioned in the libel and answer, the two vessels were off Point des Monts, bound upwards, with the wind rather fresh from the westward or down the river (the exact point from which it blew is of no consequence, both beating up the river with a contrary wind). The Leonidas had been for some time standing off the shore on the starboard tack, and was going from seven to eight knots an hour:—the Mary Ann Hutton had been standing towards the shore on the larboard tack, but at the time of the collision she was in stays, for the purpose of getting on the starboard tack and standing off the shore, or at any rate had not completed the evolution long enough to have way upon her, and to be under command. The night was dark, the distance from the shore was such that it was not necessary to the Mary

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Ann Hutton to go about to avoid any local danger. No particular signal was made by the Mary Ann Hutton to show that she was in stays, or about to go into stays, until the Leonidas was within a few hundred yards of the Mary Ann Hutton, and could be and was hailed from her; and in fact neither of the vessels seems to have seen the other until they were within this distance, which, at the rate the Leonidas was going, she would sail in two or three minutes. When the Leonidas was hailed from the Mary Ann Hutton to put her helm up, she did so, and though this manœuvre does not seem to have been the best that could have been adopted, yet it was adopted by the Leonidas at the request of the people of the other vessel, and under circumstances which made it difficult to say what ought to be done. There was not sufficient time for the Leonidas to pass astern of the Mary Ann Hutton, and she struck that vessel on the quarter, doing the damage complained of.

The general rule of navigation is, when a ship is in stays or in the act of going about, she becomes for the time unmanageable, and in this case it is the duty of any ship that is near her to give her sufficient room; but when a ship goes about very near to another and without giving any preparatory indication from which that other can, under the circumstances, be warned in time to make the necessary preparations for giving room, the damage consequent upon want of sufficient room may arise from the fault of those in charge of the ship going about at an improper time or place. Or, in the case of darkness, fog or other circumstances rendering it impossible for the ships to see each other, so distinctly as to watch each other's evolutions, the fault may be with neither. The law will support a claim for indemnification if it is shown that the vessel charged is the wrong doer; but not if the damages arise from the fault of the vessel injured, or are the result of a misfortune common to both vessels, with-

Leonidas, which has been submitted to me, that I should offer some few brief remarks, explanatory of the nautical parts of the subject, and also of the grounds upon which my opinion has been formed.

"In the first place, I am compelled to notice the contradictory statements of the libel, in which it is affirmed that the Mary Ann Hutton was on her starboard tacks, standing for the land of Point des Monts: the latter part of the statement being impossible if the former be true, and the wind, as alleged, from the westward. So also is it impossible that the Leonidas could have been bearing down upon the Mary Ann Hutton and on her lee beam at the same time. These opposing statements render it impossible to ascertain what tack the Mary Ann Hutton was on at the time of the collision. Neither does the statement that the Leonidas struck her on the lee quarter afford any explanation, since either quarter might have been the lee.

"I shall next consider the evidence of the promoter's witnesses. They concur in stating that at one o'clock on the morning of the first of September, 1840, the wind then being moderately fresh and from the westward, the Mary Ann Hutton was in stays from the starboard to the larboard tack, but had not quite completed the evolution. She had come round with her head to the northward, but had not finished the trimming of her sails, or gathered way through the water so as to be under command of her helm, when the Leonidas came up on the starboard tack, and the collision took place.

"Now, it clearly appears from this evidence, that the Mary Ann Hutton must have hove in stays right across the course, or directly in the way of the Leonidas, and at an imprudently short distance ahead of her: for, that distance could have been no more than that which the Leonidas sailed in the few minutes which elapsed from the commencement of the evolution of staying on board

LEONIDAS. the Mary Ann Hutton until the collision, which took place before its completion.

"It is customary at sea, especially at night, when a vessel is similarly situated with respect to another, as the Mary Ann Hutton thus appears to have been in relation to the Leonidas, that is, at so short a distance ahead or on the lee bow, that she could not stay without danger to both vessels to make some signal, either by showing a light over her stern or otherwise,—and waiting till an answering light had shown that the people on board the other vessel were on the alert and aware of their intention. Therefore, if the Leonidas could have been seen from the Mary Ann Hutton, and the persons in charge of the latter vessel failed to give those of the Leonidas any such intimation of their intention to stay, then in that case, they of the Mary Ann Hutton became in great measure answerable for the collision and its consequences, although I think not so entirely so, as to free the people of the Leonidas from all blame, for they ought to have vigilantly watched the motions of the Mary Ann Hutton, under such circumstances, it being part of a seaman's duty to be prepared for any accident, imprudence, or want of judgment on board other vessels near him.

"But, it does not clearly appear in evidence that the Leonidas was seen from the Mary Ann Hutton before she commenced the evolution of staying, for although the mate deposes that the night was rather clear, and that he thinks he could see two miles, yet he says that it was while his vessel was in stays that he and several others of the crew discovered the Leonidas. Again, in his cross-examination, he says, that he saw the Leonidas ten minutes before the collision, which, at the rate she is proved by those on board of her to have been sailing at the time, indicates a distance of at least a mile, and yet he adds that when seen by him she was distant only about four or five hundred yards.

LEONIDAS.

"The same discrepancy, between the time stated to have elapsed from the discovery of the Leonidas to the collision, and the distance at which she was first seen, occurs in the evidence of all the promoter's witnesses. Those witnesses depose, either directly or in substance, that the night was sufficiently clear for a vessel to have been seen at the distance of about two miles, and yet that they did not discover the Leonidas until she was within a distance of from two hundred to five hundred yards, whence it appears, either that the night was not so clear as they now think it was, or that they kept no proper and sufficient look-out.

"Turning now to the defendant's evidence, I find that the witnesses on the side of the defence agree in stating, that the night was dark, especially to the southward, or in the direction of the Mary Ann Hutton; that the Mary Ann Hutton was first seen about two minutes before the collision, that she was on the lee bow, at the distance of about two hundred yards; and that they lost sight of her again in an equally short space of time after the collision.

"The master states that he did not stop to render assistance, because, from the slightness of the shock to his own vessel, he did not conceive any to be required, and because he neither saw nor heard any indication from the Mary Ann Hutton that she required any.

"All the witnesses for the defence declare that the Mary Ann Hutton was not in stays, but of this I cannot consider them to have been competent to judge, in the confusion which they mention, and in a night so dark as they state it to have been, for the sails of the Mary Ann Hutton may have been as they state, all full on the larboard tack, and yet they may not have been long enough so for the vessel to have gathered way, so as to have become under command of her helm. I consider, therefore, that their testimony on this head cannot justly be put in competition with that of those who were on board the Mary Anne

LEONIDAS. Hutton, any more than I can allow that these latter were competent to decide whether the helm of the Leonidas was or was not instantly put up in obedience to their call. The evidence of the promoter and defendant respecting the main-sail of the Mary Ann Hutton, whether it was clewed up or at full drop, is in direct opposition, but the fact is immaterial.

"Having thus reviewed the evidence, and fully and deliberately weighed all that has been adduced in support and in defence of this action, I have come to the following conclusions:

"1. That it is established in evidence that a few minutes before the collision took place, both vessels were standing from the land near Point des Monts to the southward, being both on the starboard tack with the wind from the westward, the exact point being unimportant.

"2. That the Mary Ann Hutton hove in stays directly in the way of the Leonidas, and so near her that there was not time to complete the evolution of staying before the collision took place.

"3. That her staying so near to the Leonidas, and in such a relative position in respect to her, as it appears from the evidence she did, could only be free from the charge of the most blamable imprudence, by the supposition of her not being able to see the Leonidas, on account of the darkness of the night.

"4. That if they of the Mary Ann Hutton could have seen, or did see the Leonidas, and yet gave her no intimation of their intention to heave in stays directly in her way, they are at least as much answerable for the collision and its consequences as the people in charge of the Leonidas.

"5. That if the night was so dark that the vessels could not be seen from each other, at the time when the Mary Ann Hutton commenced the evolution of staying, and that the Mary Ann Hutton was still in stays, and without headway, when the Leonidas came up, then in that case it

would appear, from the relative position of the vessels, that the Leonidas must have gone clear of her by luffing to windward, which, being on the starboard tack, it was her place to do, and which it appears she was about to do when the call from the people of the Mary Ann Hutton induced her to put her helm up, an act which, although it proved unsuccessful in avoiding the collision, can scarcely, under the circumstances, be considered as entailing blame upon either party. In this case, therefore, I should consider the collision entirely accidental.

"6. I am therefore of opinion, that it has not been proved that the collision occurred 'solely through the inattention, want of skill, or malice of the persons on board of the Leonidas.'

"HENRY W. BAYFIELD."

Concurring in the views taken by Captain Bayfield, and in the conclusions stated in his answers, I must pronounce that the Leonidas is not liable for the consequences of the collision, and that the owners of that vessel must consequently be dismissed from this suit (*c*).

Gairdner and Stuart, for the Mary Ann Hutton.
Horatio S. Anderson, for the Leonidas.

(*c*) "STARBOARD," "LARBOARD," "PORT." — G. A. J., who inquires about the derivation of these nautical terms, will recollect that the Venetians and Genoese were among the earliest European navigators; and formed during the middle ages, and even later, the most powerful maritime states. It is, therefore, extremely probable, that the Italian language is that in which we are to look for the origin of most of our nautical terms of old standing. I have long supposed that the terms "starboard," "larboard," and "port," had an Italian origin.

Thus we have "questo bordo," *this side* of the vessel, or the side on which the helmsman stood; "quello bordo," *that side*, or the one opposite to him; *bordo*, being "tutta quella parte del vascello, che dai fianchi sta fuor dell' acqua." These terms would naturally come to be abbreviated to *'sto bord'*, *'lo bord'*.

Then, again, the master, when directing the helmsman to put

MIRAMICHI. (Gagnon) became alarmed and rang the bell, and called up the master and crew. The barque approached rapidly, and was to the windward of the Brilliant. She appeared to two of the crew of the Brilliant to be intending to go to the southward of the Brilliant, but suddenly appeared as if changing her course so as to pass to the northward of the Brilliant; and some of the crew of the Brilliant called out starboard, and the word starboard was repeated from the barque. The approach was too rapid, and the proximity too close to change the course, and the collision took place. The master, when he came on deck and saw the danger impending, ordered the helm to be put hard a starboard, and he thought it was done, and that the Light-ship sheered to the north, though not exceeding five feet. But, on this point of sheering, he might have been mistaken, for Gagnon, the seaman, was the person who went to put the helm a starboard, and he was endeavouring to unlash the helm, but did not succeed before he was called away; and the helm was not unlashed, nor put a starboard, nor did the Brilliant sheer at all. In this fact the two witnesses, Gagnon and Peltier, concur.

Then, what ground was there for imputing any negligence, or misconduct, or want of skill to the master or crew of the Brilliant? There is nothing, unless it be that they communicated orders to the barque to put the helm a starboard, and which was done accordingly. Had it not been for that fatal order the witnesses on the part of the defendants are of opinion that the barque would have gone to the northward, and clear of the Light-vessel. It does not appear to me from a comparison of the testimony that the conclusion is well drawn. The witnesses for the barque assume as a fact that the Brilliant sheered across the bows of the barque, whereas those who knew best,—the crew of the Brilliant,—declare that she did not sheer at all; she could not, because the helm was lashed and consequently unmoved. Then here stands the fact

unshaken, that the Light-vessel remained fixed and stationary, and the order to starboard her helm did not produce the collision. The vessels were within two hundred feet, or within one and two hundred yards of each other when the order, starboard, was given. The collision was too instantaneous after this order to allow it full effect. Indeed, a witness for the defendant (James Taylor) says that if the barque had not put her helm a starboard as ordered by the Brilliant, they would have run down the Brilliant, *as she sheered across the bows of the barque.* Now, she did not sheer at all, and yet, peradventure, the order from the Brilliant saved her from being sunk. The barque had sheered directly at or too close to the Light-vessel, and the error was discovered too late and was fatal, and the cry from the crew of the Brilliant was in the moment of anxiety and extremity. The course of the barque was not clearly defined, and it is quite uncertain whether a collision would not have taken place if there had not been a voice uttered or a stir made on board the Light-vessel. Coulton, the chief mate on board of the barque, cannot say whether the Light-ship sheered; he only knows that one of the vessels did sheer, and he believes, *though he cannot say with certainty,* that if the barque had continued her course, before the helm was put a starboard, and the Light-ship had remained stationary, that she would have passed clear of the Light-ship to the northward. Ought the barque to have left a doubt on that point, when she had a mile of sea room to the northward of the Light? So the witness (Taylor) *thinks* the barque would have passed between the Brilliant and the north shore, if the order "starboard" had not been uttered; and another witness (Allen) *cannot say* if the order to starboard the helm had not been given, that the barque would have run clear of the Light-ship, as it would depend upon the force and run of the tide. The witness Scott, also believes that in such a case the barque could have run clear, but

ward. Her fault was in approaching so near to the Light-ship that the force of the current and the rapid motion of the ship, brought her into a difficulty from which she could not extricate herself. Here was want of skill, and care, and knowledge of the current and of its rapidity. It was a fault in the barque to place herself in such a position. She steered so near to, if not directly at the light, at her own peril, and she must abide the consequence. The case of the Neptune the Second (*a*) shows how ships moored are protected against the intrusion of ships under sail, and the case of the Mary Campbell (*b*) shows on the other hand how the want of due attention in the stationary ship at anchor deprives her of remedy for collision.

In the present case the object of the barque would seem to be to steer as close as possible to the Light-vessel and not touch her. It was a rash, unskilful, and hazardous experiment; she had no business to implicate herself in the neighbourhood of a floating light. There was "ample room and verge enough" to the northward, and I think that upon settled principles of admiralty law and of justice she ought to indemnify the libellants for the injury they have sustained, and I pronounce accordingly.

E. L. Montizambert, for the Trinity House.
R. H. Gairdner and *A. Stuart*, for the Miramichi.

(*a*) 1 Dodson's Ad. Rep. 467.

(*b*) Vice-Admiralty Court at Quebec, 26th December, 1840. See the case of Simpson *v.* Hand, 6 Warton's Pen. R. 311, as to the want of due attention in a stationary ship at anchor.

DAHLIA.

mate asserts that the bark would have seen the light—had one existed on board the Xenophon—before the Dahlia rounded to under the stern of the large vessel ahead, and the collision would have been saved. We are therefore warranted by the testimony to conclude that the want of a light on board the brig was one procuring and substantial cause of the casualty. And whatever indiscretion may be imputed to the Dahlia, in carrying so much sail and rounding to at the time and place she did, the brig Xenophon is chargeable with a fatal default in the case, and which I think defeats her claim for damages.

I cannot but be of opinion that the evening was sufficiently dark to require a compliance with the Trinity House regulation, and it strikes me that the regulation requires a pretty strict construction in favour of its force and application, and that it would be very unsafe and contrary to sound policy, to leave the question of the degree of darkness to the loose and interested, and conflicting opinions and conjectures of the crews of the vessels in the port, so long as we have so definite and certain a test of darkness as that arising from the fact of a night without a moon. The Ch. J. of Pennsylvania in the case of Simpson *v.* Hand (*a*), in which a vessel was anchored at night in the channel of the river Delaware without a light, and for want thereof was run into, very stringently observed that having a light on board was an indispensable precaution, and the omission in a river or harbour at night amid an active navigation amounted to a negligence *per se*.

For these reasons, I am of opinion, that the claim on the part of the Xenophon ought not to be sustained.

Duval and *Anderson*, for the Xenophon.
Gairdner and *Stuart*, contra.

(*a*) 6 Wharton, 311.

10th August, 1842.

DUMFRIESSHIRE—Gowan.

In order to prevent proctors from proceeding in causes, on instructions from parties not possessing a legal *personæ standi* to prosecute a cause, the Court may require the production of proxies.

Dumfriesshire.

Judgment.—*Hon. Henry Black.*

The Honorable Charles Richard Ogden, Her Majesty's Attorney-General for Lower Canada, being absent from the Province, there were instituted in this court several suits for the recovery of penalties under the Passengers Act, 5 & 6 Wm. 4, cap. 58, the 18th section of which directs that the proceedings shall be prosecuted as for offences under any Act of Parliament now in force for the prevention of smuggling or relating to the customs, or to trade or navigation; and accordingly any such penalty or forfeiture came to be recoverable according to the Act regulating the trade of the British possessions abroad, 3 & 4 Wm. 4, c. 59, the 66th section of which provides that no suit shall be commenced for the recovery of any penalty or forfeiture except in the name of some superior officer of the customs or navy or by His Majesty's Advocate or Attorney General for the place where such suit shall be commenced. The proceedings in these suits are commenced in the name of the Attorney-General, and signed "C. R. Ogden, Attorney-General, per F. W. Primrose, Queen's Counsel, duly authorised." The defendants having appeared and given the usual security, moved "that the Honorable F. W. Primrose do produce his

are therefore within the rule above mentioned, which the Court cannot do otherwise than apply. DUMFRIES-SHIRE.

Hon. *Francis Ward Primrose, Q. C.*, for Attorney-General; *H. S. Anderson*, for Defendant.

LADY SEATON—TALBOT.

DROMOHAIR—PYNE.

INDEPENDENCE—M'CAPPINE.

Per Curiam.

These cases being in the same situation as the last, the same judgment must be entered.

Report of the law officers of the Crown on the subject of certain appeals, asserted by the Honorable Francis Ward Primrose, from decrees of the Vice-Admiralty Court, Quebec.

To His Excellency The Right Honorable Sir Charles Bagot, G. C. B., Governor-General of British North America, &c. &c.

May it please your Excellency.

In obedience to your Excellency's commands we have attentively examined the proceedings in the Vice-Admiralty court, in the case of the Attorney-General *v.* James Gowan, master of the Dumfriesshire, together with the correspondence between Mr. Secretary Rawson, and the Honorable Mr. Primrose, Queen's Counsel at Quebec, in relation to that case, as well as to the conduct of Crown cases generally, by the Queen's Counsel in the absence of the Attorney-General, and we have the honour to submit this our report for the consideration of your Excellency.

The suit against the master of the Dumfriesshire,

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was brought by Mr. Primrose, in the name of the then Attorney-General, to recover a penalty for an alleged infringement of the Passengers Act, 5 & 6 Wm. 4, c. 58, from the instructions given to him by the chief agent for emigrants, without any proxy from the Attorney-General who was in England on leave of absence. The Court proceedings were signed "C. R. Ogden, Attorney-General, per F. W. Primrose, Queen's Counsel, duly authorised."

The master of the vessel appeared by his proctor in the Vice-Admiralty court, entered into the usual stipulation or bond, and in due course moved that "the Honorable F. W. Primrose do produce his proxy, and the authority under which he instituted and prosecutes the present cause or business before this Court."

Mr. Primrose resisted this application, but the judge sustained it and ordered the production of a proxy, and this order not having been complied with, the suit was afterwards dismissed. A representation upon the subject having been made to your Excellency by Mr. Primrose, he was directed to assert an appeal from the judge's decree, and in future cases to use the name of the collector of the customs, under 66th section of the Act 3 & 4 Wm. 4, c. 59, and the 18th section of the Passengers Act, in order to avoid similar objections.

Mr. Primrose has very correctly stated that the new Passengers Act having completely altered the mode of proceedings to be had in future, the decision of this question (the necessity of a proxy), in so far as that Act (5 & 6 Wm. 4, c. 53) is concerned, is a matter now of indifference. With reference however to the Crown cases generally, both in the Vice-Admiralty and other courts, the question raised in the case of the master of the Dumfriesshire is no doubt of great practical importance, as the personal attendance of Her Majesty's Attorney-General for Lower Canada, in all the courts, is rendered impracticable, by the judicial organisation of these courts

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into distinct and separate tribunals, possessed of equal powers and of the same jurisdiction, which they exercise at the same time in different and distant districts.

In examining the question we could not fail to observe the essential difference in the practice of the Admiralty from that in use in the other courts. The Admiralty Courts administering the civil law of Rome, have closely followed the procedure of the Roman system. Hence at the outset of a suit in imitation of the old Roman stipulations or bonds *judicatum solvi, de judicio sisti, et de rato*, a defendant is required in the Admiralty to give bond by which he and his sureties submit to the jurisdiction of the Court, bind themselves to answer the action, to abide the hearing of the cause, to satisfy the condemnation, and to pay what is adjudged with expenses. This bond at the present day, like the old stipulation, is given technically, not by the party but by his proctor. "The stipulation *de rato*, as it was shortly called, or *ratam rem habiturum dominum*, was one required of the proctor of the *actor* or plaintiff, by which he was required to give security that the principal should ratify his acts. Digest. Lib. 46, Tit. 8. *Ratam rem haberi, et de ratihabitione.* It was not required universally, but only when it was not clear whether the proctor was or was not authorised to act for the principal in the matter in question. Code 2, 13, 1. Vinnius in Inst. 4, 11, in princip., No. 1. The reason of the rule is obvious; if he had authority, the stipulation was unnecessary; if he had not, the judgment would not be binding on the plaintiff, and the defendant might be called on to litigate the same question again; *periculum enim est iterum dominus de eâdem re experiatur.* Gaii Instit. 4, 92, Justinian Instit. 4, 11, in principio. If there was no question of the proctor's power to act for the principal, as if he had been constituted proctor in Court *apud acta.* Code 2, 57; or if a written authority was in the defendant's hands, the stipulation was not

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Under a system of practice which authorises a defendant to call for the power or proxy of the adverse agent or proctor, in a case where that agent professed to act upon an authority delegated to him by another, and where the sufficiency of that authority, if produced, might have been questioned, the Admiralty judge required the production of a proxy.

In reviewing the proceedings of his Court, we cannot but acquiesce in the legality of his judgment.

On the other hand, adverting to the practice of the Common Law Courts of Lower Canada, we find a totally different system prevailing, under which it is an axiom that the authority of an attorney cannot be questioned by the opposite party, The doctrine of stipulations is wholly unknown in these courts, and attorneys are officers acting for their clients, and in their names, under the control of the several tribunals. There is no rule of law by which one attorney may not delegate to another the power of acting, and therefore of signing acts for him, and there is even an express rule, in the Court of Appeals which enjoins upon attorneys residing out of the city of Quebec, to appoint an attorney resident there as an agent for them. We are not aware of any rule either in the practice of the Courts in England, or in either of the sections of this Province, by which the Attorney-General, or any other attorney, may not delegate to a professional brother the power of signing legal proceedings for him and in his name. The argument *ab inconveniente*, resulting from the organisation of the Courts of Lower Canada, would be easily shaken by a judicial decision founded upon some known rule of law. But if precedents be adverted to, it will be found that they are in favour of the practice of conducting and signing proceedings in the name of the Attorney-General by other counsel. This practice has been sustained, with reference to Mr. Primrose himself, by the Court of King's Bench at Quebec, in the cases of

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the Queen *v.* Bonner, and the Queen *v.* Petry, and also in the District Court of Quebec. We believe that it may be said that the practice never has been shaken, and has been and is general. With reference to the course which obtains in England, we know that in some proceedings under the excise laws at the instance of the Crown, the Solicitor of the Treasury is the prosecuting officer, and his printed name at the foot of process has been held sufficient.

We are therefore humbly of opinion that the Attorney-General may, in his discretion, empower the Queen's counsel to conduct the Crown suits and prosecutions in his name, by giving them special instructions in particular cases, or in cases of emergency or requiring celerity and despatch, by adopting and confirming acts done under a general authority to defend the interests of the Crown when liable to be prejudiced.

All which is most respectfully submitted by your Excellency's, &c.

L. H. LAFONTAINE, Attorney-General, L. C.
ROBT. BALDWIN, Attorney-General, U. C.
T. C. AYLWIN, Solicitor-General, L. C.
JAS. E. SMALL, Solicitor-General, U. C.

KINGSTON, 16*th January*, 1843.

26th August, 1842.

ROBERT AND ANNE—RICHMOND.

ROBERT AND ANNE.

Seamen while acting in the line of their strict duty, cannot entitle themselves to salvage. But extraordinary events may occur, in which their connexion with the ship may be dissolved *de facto*, or by operation of law, or they may exceed their proper duty, in which cases they may be permitted to claim as salvors.

JUDGMENT.—*Hon. Henry Black.*

The ship Robert and Anne sailed on a voyage from London to Quebec, on the 24th of April last, and in coming up the river St. Lawrence struck on a reef at or near Matane, about two hundred miles below Quebec. The master believing her to be a total wreck abandoned her, coming on shore in his boat with part of his crew, and proceeding to Quebec by land to make the usual protest, which he did. The chief mate and the rest of the crew remained on board, and by their exertions the vessel was got off, with no very great damage, and came to Quebec (*a*), where the crew who had signed articles for a voyage to Quebec and back to Great Britain, instituted proceedings in this court as salvors claiming salvage. But, as their connexion with the vessel does not appear to have been dissolved *de facto*, or by operation of law, and as, in my opinion, they have not exceeded the duty which devolved upon them, under their articles, to labour in the preservation of the vessel and cargo, out of which they were to be paid their wages, they are not entitled to be considered as salvors, and the suit must be dismissed.

It appears to me that the seamen, including the pro-

(*a*) Sailed on her return voyage on the 29th August of the same year.

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moter, ought to be allowed their wages up to the termination of the voyage, and that the stranding of the ship in the St. Lawrence, and her recovery and arrival at Quebec by the exertions of the crew, do not present a case entitling them to any extraordinary extra-compensation by way of salvage, as for any hazardous and meritorious services. The seamen did their duty and stuck to the ship, and got her off the rocks, and brought her to port, and their wages justly continued until the voyage ended. But there was nothing extraordinary in the case, and of so perilous a nature as to entitle them to compensation beyond their contract. If the ship had not been recovered, but had perished on the rocks where she was stranded, notwithstanding all the faithful and strenuous efforts of the crew, and there had been property saved, then the crew might possibly have had an equitable claim, which would have been felt by a Court of Admiralty, for compensation out of the property saved, for their particular services. But here the continuance of their wages up to the arrival of the ship at her port of destination is, I should apprehend, sufficient for the occasion, and to that extent I think they ought to be allowed, on the ground that the voyage did not end, nor were they discharged from their contract previously. I do not perceive the policy or the authority in the marine law, that would allow the seamen a further reward in the nature of salvage; for the case does not strike me, under the circumstances, as coming within the exception to the ordinary principles of the maritime law on the subject of salvage (*b*).

Gairdner and *Stuart*, for the seamen.
Duval, for the ship.

(*b*) This very important legal question was fully and carefully discussed before the High Court of Admiralty of England, on the 14th May, 1852, in the case of the Florence (16 Jurist, 572), wherein the crew were rewarded as salvors. Dr. Lushington, justly

distinguished for his eminence as an Admiralty judge, commenced his judgment in that case as follows: "I conceive the question to be this, whether when a merchant ship is abandoned at sea, *sine spe revertendi aut recuperandi*, in consequence of damage received and the state of the elements, such abandonment taking place *bonâ fide* and by order of the master, for the purpose of saving life, the contract entered into by the mariners is by such circumstances entirely put an end to; or whether it is merely interrupted, and capable by the occurrence of any and what circumstances, of being again called into force. I think all the circumstances I have stated are indispensable to the just framing of the proposition. First, the abandonment must take place at sea, and not upon a coast, for if a ship be driven upon a coast and become a wreck, and the mariners escape to the shore, the contract enures to this extent at least, that if they act as salvors, and successfully, so as to save enough to pay their wages, they will be entitled to them though not to salvage; if they do not so exert themselves, their wages are lost.—The Neptune, 1 Hagg. 227. Secondly, the abandonment must be *sine spe revertendi*; for no one would contend that a temporary abandonment, such as frequently occurs in collisions, from immediate fear, before the state of the ship is known, would vacate the contract. Thirdly, the abandonment must be *bonâ fide* for the purpose of saving life. Fourthly, it must be by order of the master, in consequence of danger by reason of damage to the ship and the state of the elements."

In the case of the barque Flora, Wilson (27 Oct. 1832), Judge Kerr allowed salvage to the chief and second mates and carpenter, for their meritorious services, equal to one-third of the gross proceeds arising from the sale of the articles saved from the wreck.—See Nautical Magazine for February 1833, Vol. 2, No. 12, p. 87.

indicated, by the average of seasons, as the prudent period of departure. The promoters were shipped at Falmouth, in England, on a voyage from that port to Quebec, and back to a port of discharge in the United Kingdom, at £2 10*s.* sterling, per month. The Jane sailed from Quebec on the 28th November, on her return voyage, but having encountered foul winds and boisterous weather about the 1st of December, below the Brandy Ports, she was obliged to be run ashore, in order to avoid total shipwreck from the immense and sudden accumulation of drift ice in the river; she was stranded at high water at St André, on a muddy bottom, and put into a place of safety for the winter, about 100 miles below Quebec. On the 16th December, the master, (having returned from Quebec,) informed the crew that the vessel had been condemned; and after various overtures to the men prevailed upon them to accept their discharge with wages up to that period, which were paid—ten shillings currency in cash—and the balance by drafts on the agent at Quebec, giving receipts in full of all further demands, but without any tender of indemnity, or the means of travelling to an open Atlantic port. They were afterwards, at the expense of the ship, brought to Quebec, where they again signed receipts in full of all further claims and demands. The libel alleges a tortious discharge procured by false and fraudulent representations; and that no provision had been made for their subsistence during the winter, or their transportation to an open sea-port on the Atlantic, with the payment of wages up to their arrival at such port; and claims wages up to the 1st June next, with the cost of their board during that period. The defence rests upon the right of the master under the circumstances to discharge the crew, and the fact of their having executed receipts, in full satisfaction of their claims, and releasing the master, ship and owners from all further liability.

JANE.

Two questions have been presented at the argument

JANE. for the deliberation of the Court, and I have come to a conclusion.

1. That the receipts and discharges of claims by the crew of the vessel given in December last, are not a bar to their further claim for compensation. The receipts are good evidence of the money received, and for which they are to be charged, but no further. It appears to me from the testimony of Blouin the pilot, and of two of the messmates, that the settlement and receipts were made under undue and oppressive influence, and without free consent. The information upon which the coercion was founded was not true; at least there is no evidence that the vessel was regularly condemned, and for aught that appears, the information may have been false. Mariners, in the view of Admiralty law, are *inopes consilii*, and are under the special protection of the Court, in like manner as minors and weak persons are entitled to have the guardianship of a Court of Chancery thrown over them. They are treated as wards of the Admiralty. The observation of Lord *Stowell* in the case of the Juliana (*a*), and of Judge *Story* in Harden *v.* Gordon (*b*), as well as of Judge *Ware* in the case of the David Pratt (*c*), show in a strong light the jealousy and vigilance, and parental care of the Admiralty, in respect to hard dealings, under forbidden aspects, with the wages of seamen. I think that in the spirit and policy of the cases, the discharges and receipts in full, almost I may say extorted from the seamen, ought not to bar an equitable claim for compensation beyond what the promoters have received.

2. The amount of the compensation is another, and perhaps a more unsettled question. The decision of Lord *Stowell* in the case of the Elizabeth (*d*), comes nearer to the case before us than anything I have seen. It is there

(*a*) 2 Dodson, 504.
(*b*) 2 Mason, 561.
(*c*) Ware, 495.
(*d*) 2 Dodson, 403.

said that though the master be not at liberty to discharge his crew in a foreign port without their consent (and if he does, the maritime law gives the seamen entire wages for the voyage with the expenses of return), yet that circumstances—as a *semi-naufragium*—where repairs may be doubtful or very dilatory, might vest in him an authority to do so, *upon proper conditions*, as by providing and paying for their return passage, and their wages up to the time of their arrival at home. I think the present case would warrant the adoption of this rule; and yet there is a latitudinary discretion resting in the Admiralty Judge—and must be under the special circumstances—and I apprehend he may consider what would be most just and reasonable; as, whether the wages were to be continued to the arrival of the seamen in England, or to the nearest open American commercial port, say Boston, or until the opening of the navigation of the St. Lawrence. One or the other of the alternatives, I think I must adopt, and from a local knowledge and view of the circumstances of this case, as they appear before me, I award wages, including the expense of board and lodging until the opening of the navigation of the St. Lawrence (*e*).

Alleyn, for promoters.
Duval, Q. C., for respondents.

(*e*) The Factor, MSS. Reports of the Vice-Admiralty Court at Quebec, 16th June, 1836.

Tuesday, 16th November, 1847.

LADY SEATON—SPENCER.

LADY SEATON. **General Merchant Seamen's Act (7 & 8 Vict. c. 112, s. 2). Articles not signed by the master, as required by the General Merchant Seamen's Act, cannot be enforced.**

This was a proceeding on the part of William Hodgson, to recover a sum of money due to him for wages earned on a voyage from the port of London to Quebec. The demand was objected to on the ground that he had entered into an agreement with the master on the 1st of September last, to proceed on a voyage from London to Quebec and Montreal and "back to a port of discharge in Great Britain." It was urged, on the other hand, that the mariner's contract was irregular, because it had not been signed by the master as required by the Merchant Seamen's Act. The magistrate, before whom the complaint on behalf of the seaman was made under the authority of that Act, referred the case to be adjudged by this Court, and the following judgment was this day pronounced.

JUDGMENT.—*Hon. Henry Black.*

I am called upon in this case to enforce indirectly,—by refusing to the promoter wages for the services rendered by him to the ship,—his executory contract to Great Britain, as the ultimate port of discharge in the articles which have been produced, those articles not being signed by the master. The law respecting the reducing to writing in shipping articles the agreement between the seamen and the master is but a part of the law, as well common as statute, which relates to this important object, and to form a right adjudication upon any branch of it, it

is necessary to have in mind the whole scope and policy of the one and the other law upon that head. Without touching upon this branch of law further than is necessary for the question immediately under consideration, it is to be observed that one of the ends and objects of that law is to ascertain with certainty,—for the protection of a class of persons who, from their habits of carelessness and over-confidence, are often over-reached,—the contract into which they enter, both as to the amount of remuneration that they are to receive, the description of the service, and the penalties to which they render themselves liable by any dereliction of the duties which are imposed upon them. The ship's articles, and the signing of them by the seamen, are therefore of importance, as settling the terms of the contract, and rendering present to the mind of the seaman, as a conventional obligation upon him,—with the binding force of which he is better acquainted than that of statutes which he does not read,—the necessity of obedience to the master, and of the faithful discharge of his duty; adding at once a promise to perform it, and an agreement to suffer all the penalties which the law imposes in case of failure. To attain this end, the legislature has prescribed a certain form of articles; they have conferred upon the master, upon his observing these forms, summary and extraordinary means of enforcing this contract, otherwise a simple contract *locati conducti;* and they have, on the other hand, subjected him to pecuniary penalties for taking into the service of the ship a seaman without executing regular articles. This contract stands not then upon the footing of an ordinary contract *locati conducti.* The provisions just adverted to are provisions of a great maritime power, in the discipline and order of whose seamen is to be found not only the foundation of its merchant navy, but also that of its national navy.

With an object in view of such high importance, and to

LADY SEATON. use the words of the preamble of the statute, to promote the increase of the number of such seamen, and to afford them all due encouragement and protection, on a large, constant, and ready supply of whom the prosperity, strength, and safety of the United Kingdom and of Her Majesty's dominions do greatly depend, it is enacted, "That it shall not be lawful for any master of any ship of whatever tonnage or description belonging to any subject of Her Majesty, proceeding to parts beyond the seas, or of any British registered ship of the burden of eighty tons or upwards, employed in any of the fisheries of the United Kingdom, or in proceeding coastwise, or otherwise, from one part of the United Kingdom to another, to carry to sea any seaman as one of his crew or complement (apprentices excepted), unless the master of such ship shall have first made and entered into an agreement in writing with such seaman, specifying what wages such seaman is to be paid, the quantity of provisions he is to receive, the capacity in which he is to act or serve, and the nature of the voyage in which the ship is to be employed, so that such seaman may have some means of judging of the period for which he is likely to be engaged; and that such agreement shall be properly dated, *and shall be signed by such master in the first instance*, and by the seamen respectively at the port or place where they shall be shipped; and that the signature of each of the parties thereto shall be duly attested by one witness at the least, and that the master shall cause the agreement to be read over and explained to every such seaman in the presence of such witness, before such seaman shall execute the same" (*a*). The statute confers summary remedies in various cases for enforcing this contract against the seamen, and subjects the master to a penalty of 10*l.* for every seaman he shall carry out to sea with-

(*a*) 7 & 8 Vict. c. 112, s. 2.

out having entered into the agreement required by the statute (*b*). The signing is not a mere *solemnitas juris*, but it has substantially this effect, that it is evidence against and binds the master personally, whether he goes with the ship or not. In an action for the penalty under the last-mentioned clause of the statute, it is apprehended that it would be no defence to such an action for the master to show, as the articles required by the statute, articles which were not signed by him. The form in which instruments of this nature are to be executed having been directed by the statute, it is not easy to believe that in settling this form such a condition should have been required without consideration; it is one of the provisions taken from Sir James Graham's Act (*c*) not found in the previous statutes in this matter (*d*); and an additional reason is here afforded that this provision is not without an object.

The statute thus requiring ship's articles to be signed by the master, and the articles in question in this cause not being so signed, the master has voluntarily put himself out of the provisions of the statute law on this head, and it is impossible for the Court to afford him any aid in enforcing a contract which he has not invested with the forms which the law requires. If the Court were to enforce this contract it would indirectly enforce the carrying of the promoter to sea, without the ship's articles required by the statute, and be aiding the master in contravening the statute. Now, it seems to be a good general rule, that wherever a contract has for its basis the performance or omission of some act, the doing or omitting of which would contravene the provisions of the statute law, the agreement is invalid, no less than it would be where in any similar case the provisions of the

(*b*) 7 & 8 Vict. c. 112, s. 4.
(*c*) 5 & 6 Will. 4, c. 19, s. 2.
(*d*) 2 Geo. 2, c. 36; 37 Geo. 3, c. 73; The Baltic Merchant, Edwards's Rep. 87.

1*st August*, 1848.

JOHN MUNN—RICHARDSON.

JOHN MUNN.

If it be practicable for a vessel which is following close upon the track of another to pursue a course which is safe, and she adopts one which is perilous, then if mischief ensue she is answerable for all consequences.

JUDGMENT.—*Hon. Henry Black.*

This was a case of racing between two of the large passenger steamers plying on the St. Lawrence, between Quebec and Montreal. The Lord Sydenham, on the twenty-fourth of May last, at the usual hour advertised for her departure, left her berth at the wharf in the harbour of Quebec, at which she had been lying with her head down the stream, and taking a sweep round towards the Point Levi Shore, so as to get her head up the stream, returned into the usual course on the north side of the river. A few minutes after the Lord Sydenham started, the John Munn, a swifter steamer, which had been lying with her head up the stream, at a wharf above that from which the Lord Sydenham started, also got under weigh and proceeded up the river on the north side. The superior speed of the John Munn brought her nearly up to the Lord Sydenham at the time when that vessel was nearly abreast of the brig Henry—then lying at anchor to the southward of both vessels in that part of the river known as the ballast ground—when the John Munn, in trying to pass the Lord Sydenham, and between her and the brig, ran into the latter, doing the damage for which this action is brought by the owners of the brig against the John Munn. An immense mass of evidence has been adduced in the action, and as is usual in such case, the statements of the witnesses are very conflicting.

JOHN MUNN.

The brig being at anchor, and no blame being imputed to her, the contest came virtually to be, which of the two steamers was responsible for the damage done to the brig. In a case of this kind the rule of law is, that if it be practicable for a vessel which is following close upon the track of another, to pursue a course which is safe, and she adopts one which is perilous, then if mischief ensue she is answerable for all consequences (*a*). The Court has the good fortune upon this occasion to be assisted by Captain Edward Boxer, R. N. C. B., one of the most experienced and able seamen in the British service, whose skill and knowledge can be best appreciated by those of his own profession (*b*). He has listened with great patience and attention to the arguments of the counsel, and has carefully examined all the evidence in the case, and his opinion is decidedly against the conduct of the John Munn, an opinion which the Court cannot have a moment's doubt in adopting; and I pronounce accordingly.

(The amount of the damage was subsequently established at the sum of 304*l.* 4*s.* 2*d.* currency, by the Registrar and merchants to whom the usual reference was made (*c*).)

Andrew Stuart, for the brig.
Dunbar Ross, for the John Munn.

(*a*) Lord Ellenborough, in Mayhew *v.* Boyce, 1 Starkie's Rep. 425.

(*b*) Subsequently Rear-Admiral Boxer, who died at Balaclava during the Crimean campaign.

(*c*) It is the duty of every vessel seeing another at anchor, whether in a proper or improper place, and whether properly or improperly anchored, to avoid, if practicable and consistent with her own safety, any collision. The Batavier, 4 Notes of Cases, 356, and 2 W. Rob. 407.

Where a vessel at anchor is run down by another, the *onus* lies on the latter to prove the collision arose from some cause which would exempt her from liability. Ibid.

Tuesday, 19*th September*, 1848.

MARY JANE—Trescowthick.

Persons furnishing supplies to ships in this country, technically called material men, have not a lien upon the ship for the amount of their supplies; and the Court has no jurisdiction to enforce demands of this nature.

In this case an action was entered against the Mary Jane, a schooner built and registered within the port of Quebec, for the value of materials and work supplied to her by John Armstrong.

The libel shortly pleaded that this person was engaged on or about the 29th of June last by Jonathan Trescowthick, the owner and master, to furnish all the iron work necessary for the fitting out and rigging of the vessel, and rendering her seaworthy, without which she could not proceed to sea; that he was employed on board of her in furnishing this iron work from the 29th of June to the 9th of the present month of September, during which time the schooner was in the harbour of Quebec, within the District of Quebec; and that the amount due for the necessaries in question was 49*l*. That the schooner was "a sea-going vessel," and that the owner refused to pay.

On the part of the owner the jurisdiction of the Court to entertain the suit was denied, and upon this ground the admission of the libel was objected to.

Judgment.—*Hon. Henry Black.*

The question which this case brings under the consideration of the Court is, whether persons furnishing supplies to ships in this country,—technically called material men,—have a lien upon the ship for the amount of those supplies; and if so, whether the Court has juris-

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diction to enforce such lien. The word lien is used from the want of any other word in the English language to express the exact nature of the right claimed. When used in relation to material men, as in the question above stated, it has an import different from the ordinary import. Lien, in the common acceptation of the term in the English law, implies an actual possession in the holder of it, of the subject upon which it is claimed. There is no doubt that in this sense of the word ship-builders, like other tradesmen in possession of the subject upon which their labour has been employed, have a lien upon the subject for the price of their labour, so long as they retain the possession (*a*). But the lien here claimed is entirely apart from the possession; it is rather a right to proceed against the vessel, and to be paid out of the proceeds, in preference to all other creditors, and being strictly the *hypotheca* of moveables, allowed by the civil law, may, to avoid confusion, be conveniently denominated hypothecary lien.

The hypothec of moveables is, it is believed, unknown in the English municipal or common law; and in the civil and maritime law of England is confined within a small number of cases, such as seamen's wages, and special hypothecation. It is true that by the general maritime law of Europe and America, an hypothecary lien is given for repairs done and materials furnished to other than domestic ships (*b*), and in many countries for repairs and supplies to domestic ships also (*c*); and this hypothecary lien follows the ship into the hands of a *bonâ fide* purchaser without notice (*d*). There are considerations of

(*a*) The Vibilia, 1 Robinson, p. 6; The Harmonie, Ibid. p. 178.

(*b*) The General Smith, 4 Wheat. p. 438; St. Jago de Cuba, 9 Wheat. p. 409.

(*c*) Valin sur l'Art. 16, tit. 14, liv. 1er. de l'Ord de la Marine; Boulay Paty, Cours de Droit Coml. tom. i. pp. 110, 124; Abbott on Shipping, p. 149, 7th edit.

(*d*) Madona d'Idra, Dodson, p. 40.

convenience and public policy applicable as well to the one rule as to the other. The rule of continental Europe and of America has a strong show of equity in its favour; the labour and materials of the material man are incorporated with the ship, and the owner being allowed to profit by this augmentation in the value of his ship, without paying for it, seems to contravene the rule that *nemo debet locupletari aliena jactura*. So, it would seem greatly to facilitate navigation by enabling the master or the owner, at all times, and in all places, to command for the purposes of his voyage a credit equal to the value of the ship. The policy of the English law seems to lie deeper. It has been quaintly but truly said, that "ships were made to plough the ocean, not to rot in port." The allowing of hypothecary liens upon moveables is repugnant to commercial policy, and eminently so would be the allowance of such lien upon ships, as subjecting them to unnecessary detention, and diminishing the security of titles to them. If the material man be unwilling to make repairs to the ship at the port to which she belongs, upon the credit of the owner, he may obtain from him a special hypothecation of the ship, for this as for any other debt. If the master should require repairs to be made in the progress of his voyage in a port abroad,—and there be a necessity of the hypothecation of the ship for the making of such repairs,—he too may hypothecate the ship (*e*). The maritime law of England then in refusing a tacit hypothecary lien, and in allowing and enforcing a special hypothecation of the ship,—made by the owner under any circumstances, or by the master in the progress of the voyage in case of necessity,—equally provides for the ship's ploughing the ocean and for her not rotting in port.

(*e*) The Gratitudine, 3 Rob. Ad. Rep. 240; Sir Joseph Jekyll, in Watkinson *v.* Bernadiston, 2 Peere Williams, 367; Benzen *v.* Jeffries, 1 Lord Raym. 152; Johnson *v.* Shippen, Salk. 35.

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But whatever may be the reason of the one or the other rule, the Court is bound to enforce and carry into effect the law as it stands.

The commissions to the Judges of the Vice-Admiralty Courts in the British possessions abroad, empower them to hear and determine causes "according to the civil and maritime law of the High Court of Admiralty of England." The terms of the commissions were settled at a very old date, they are very general, but necessarily controlled by the above cited words, introduced with a view to one uniform system for the guidance of the Courts of Admiralty in every part of the British possessions.

The inquiry thus narrows itself down to the question, what in relation to material men is the civil and maritime law of England? Now, a long course of uniform decisions in the English Courts, from the time of Charles the Second down to the case of the Neptune in 1835 (*f*), has established the principle that no hypothecary lien exists for work done or materials furnished to ships in England. Where an attempt similar to the present was made by a person who had repaired a ship, to claim a lien on the proceeds of her sale, Lord *Hardwicke* states it as one of the questions in the cause, whether the money arising from the sale should be answerable to the plaintiff; and then after laying down the rule that the ship itself would not be liable, he proceeds to say: "If therefore the body of the ship be not liable or hypothecated, how can the money arising by sale be affected or followed, the one being consequential of the other (*g*)?" In the latest case upon this subject,—that of the Neptune,—the judicial committee of the Privy Council, upon an appeal from the High Court of Admiralty of England, expressly denied that material men ever had, by the English maritime law, in respect of such contracts, any lien upon the ship, or

(*f*) 3 Knapp's Cases in the Privy Council, p. 94.

(*g*) Ex parte Shank, 1 Atk. 234.

any preference over other simple contract creditors on the proceeds. The same rule obtains in Scotland, the municipal law of which country like our own, in Lower Canada, recognises hypothecary liens. In the case of Wood *v.* Hamilton, the House of Lords, on the 15th June, 1789, upon an appeal from the Scotch Courts, affirmed a judgment against this claim, although such claims had been frequently allowed in the Courts of Scotland during a period of four-score years preceding (*h*). Then, as to repairs made abroad, in the course of the voyage, the hypothecation must be express, whether made by the owner or by the master (*i*). In the numerous cases in which repairs have been made, or materials furnished by orders of the master abroad,—and in which attempts have been made to enforce the claim of the material man against the ship,—the hypothecation has been express; and the question has generally turned upon the necessity, which alone could authorise the master to hypothecate the ship. No tacit hypothecation of the ship has ever been recognised in the High Court of Admiralty (*k*); and in the case of the Neptune, already adverted to, in which a privilege, over the proceeds of the ship in the registry, was asserted by the High Court of Admiralty, the judgment was, after much consideration, reversed by the Judicial Committee of the Privy Council.

I will shortly advert to another point that has been pressed upon the Court in the argument of the Counsel for the promoter. It has been contended that the sixth section of the Act 3 & 4 Vict. c. 65, confers upon the Court an authority which it did not previously possess in such matters. The words of this section are these:— "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature

(*h*) Abbott on Shipping, p. 147, 7th edition by Shee.

(*i*) Justin *v.* Ballam, Salk. 34.

(*k*) See judgment of Sir Christopher Robinson, in the case of The Maitland, 2 Haggard, p. 254.

26th June, 1849.

HERCYNA—O'BRIEN.

HERCYNA. There seems to be no fixed limit to the duration of a maritime lien; but must be enforced within an equitable period, considering the nature of the lien and the changes of interest therein.

JUDGMENT.—*Hon. Henry Black.*

The promoter in this case piloted the ship Hercyna, from Quebec to Bic, on the 28th of May, 1848, for which service he was entitled to the sum of 16*l.* 2*s.* 6*d.*, sought to be recovered in this suit. On the 31st July, in the same year, he took from John Jeffery, then owner of the ship, a promissory note at three months for the above sum. The ship having returned to the port, the promoter on the sixth of October, in the same year, again piloted her down from Quebec to a place between the Brandy Pots and Bic Island, for which he was paid in money 16*l.* 2*s.* 6*d.* On the 6th November, the note, given for the first service, was protested for non-payment, and on the 23rd of January of this year, it was returned to Jeffery, the maker, by the promoter, who thereupon got back his receipt for the note. On the 18th of April last, the ship was sold by Jeffery, through his agent in Great Britain, to John Richard Broadbent, the present owner, without notice of the promoter's claim. The ship having again returned to Quebec, was on the second of the present month of June arrested on process out of this Court, for the pilotage earned in May, 1848, and for which the promoter claimed a lien on the ship under the maritime law. As between the owner, at the time of the service rendered, and the pilot, the claim might perhaps be a permanent lien on the vessel, but the fact of her having

30th March, 1850.

BY-TOWN—HUMPHREY.

BY-TOWN.

In a cause of collision between two steam vessels, the Court, assisted by a captain in the Royal Navy, pronounced for damages and costs, holding that the one which crossed the course of the other was to blame.

JUDGMENT.—*Hon. Henry Black.*

This is a case of collision. The action is brought by the owner of the steamer John Munn, against the steamer By-Town, for damage done to the John Munn by the By-Town, in the night of the twenty-first of June last, while the former was pursuing her ordinary course to Quebec, and the latter was proceeding upwards towards Nicolet. When nearly abreast of the river Champlain, the John Munn being in the usual channel and running down the stream, the By-Town, about an hour after midnight, crossed the river taking a course in a diagonal direction towards the north shore, and in so doing came across the course of the John Munn, and struck her on the starboard side doing the damage complained of, which is considerable. Captain Boxer, R. N. C. B., who has attended the Court as an assessor, having heard the whole of the arguments of the counsel and read the evidence, has given in writing an opinion to the following effect.

"I am decidedly of opinion that the case is clearly made out against the By-Town; and in coming to this conclusion I am particularly guided by the statements of

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St. Lawrence she was overtaken by a storm, as she was lying off Cacona, at anchor, of such violence as to part her anchors, and oblige the master to run her ashore in Cacona Bay, where she remained until the 14th, and then drifted away with the ice. The vessel continued to drift until she struck on Apple Island, in the River St. Lawrence, at which place she was moored with a hawser chain and a tow line, under the directions of the mate. The master and nine of the crew had left her in the jolly boat and pinnace, while lying in Cacona Bay, and the rest of the hands came off in the long-boat from Apple Island. The vessel broke from her moorings on the 23rd of December, knocked her bottom out, drove up inside of Green Island, and became a complete wreck; and some days after she again drifted from Green Island and grounded on Basque Island.

The objections taken to the claim of the promoters, were, 1st. That no wages were due on the outward voyage from Milford to Quebec, because the vessel coming in ballast earned no freight; 2ndly. That the vessel was wrecked in the River St. Lawrence, on her return voyage, and abandoned by the master as a total loss.

JUDGMENT.—*Hon. Henry Black.*

The claim of the seamen of wages for their services on the outward voyage from Milford to Quebec, is not, in my opinion, affected by the vessel's sailing in ballast. The vessel arriving in safety at the port of destination of the outward voyage, wages accrued to the seamen for the whole period of that voyage, and one-half of the period that the vessel remained in this port (*a*), notwithstanding that the outward voyage was made by the ship in ballast (*b*). The act of the owners in sending the ship out without a

(*a*) Per Holt, C. J., apud Lord Raym. 739.

(*b*) The Two Catherines, 2 Mason's Rep. 328.

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is nothing to shew that all proper measures were not taken for the safety of the vessel, when the accident happened. I have it not in my power to form a judgment upon this point, from the evidence in the cause, nor does it seem necessary that I should, as it lay exclusively with the master to leave the vessel or not, as in his judgment seemed best. The promoters do not seem to have been guilty of any of the acts of misconduct which the law punishes by the forfeiture of wages; and the abandonment of the ship by the master had not, I think, the effect of divesting the mariners of their lien upon the ship, and whatever remained of the ship for their wages. The decision of Mr. Justice *Story*, in the case of the Two Catherines (*g*), goes a great way to settle the present case. In that case, the ship sailed from Newport to Gibraltar, discharged the cargo there, proceeded to Ivica, in ballast, and thence with a cargo homeward to Providence. She was wrecked in the Narragansett Bay, and by great exertions of her master and crew, considerable portions of the ship and cargo were saved. The seamen claimed wages from Gibraltar to Ivica (the wages to Gibraltar having been paid), and from Ivica to Providence, asserting a right to wages, and if that could not be sustained, claiming a right to salvage equivalent to wages. The claim was resisted by an Insurance Company, to whom the things saved had been abandoned as for a total loss. The distinguished jurist before whom the case was argued, awarded the amount claimed on the voyage from Gibraltar to Ivica, as wages, and further as salvage, the wages of the seamen for the homeward voyage. In the case of the Neptune (*h*), too, the wages awarded by Lord *Stowell*, were wages which accrued on the voyage in which that vessel was wrecked, and were ordered to be paid out of the proceeds of the materials saved, so far as the frag-

(*g*) 2 Mason's Rep. 319. (*h*) 1 Haggard's Rep. 227.

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fore dismiss their claim, but without condemning them in costs (*u*).

Charles Alleyn and A. Campbell, for the promoters.
John J. C. Pentland, for the owners and master.

(*u*) Since the above decision was given a revision of the entire law of the mercantile marine has been effected, and wages are no longer to be dependent on the earning of freight. The Merchant Shipping Act (17 & 18 Vict. c. 104) contains the following provision on this head:—

"No right to wages shall be dependent on the earning of freight; and every seaman and apprentice who would be entitled to demand and recover any wages if the ship in which he has served had earned freight, shall, subject to all other rules of law and conditions applicable to the case, be entitled to claim and recover the same, notwithstanding that freight has not been earned; but in cases of wreck or loss of the ship, proof that he has not exerted himself to the utmost to save the ship, cargo, and stores, shall bar his claim."—Sec. 183.

CRESCENT. ROWLAND HILL.

of the St. Lawrence. That the Crescent, coming down astern of the Rowland Hill, at the distance of about one hundred yards—being desirous, as promoter supposed, of coming in before the Rowland Hill—made a very short and unusual turn, crossing above the three ships before mentioned, far above where steamboats coming into Quebec, during the ebb tide, usually turn, and far above the point at which she ought to have turned—in consequence of the position of the vessels then lying at anchor in the stream—and bringing herself, by the shortness of the turn so near the wharf as to be unable to bring her stem up the river without backing out into the river. That the captain of the Rowland Hill, after having turned, and while coming up the river to her wharf—perceiving the Crescent attempting to make the turn above described, and fearing a collision—caused the engines of the Rowland Hill to be eased and then stopped, but could not cause his boat to back water without running foul of one of the three vessels above mentioned. That when the two steamboats came nearly opposite one of the wharves in the harbour of Quebec, commonly known as Gibb's wharf—the Crescent then going at her full speed —through the mismanagement, want of skill, and negligence of the persons on board and in charge of her, owing also to the fault they committed in turning, and to their not stopping nor moderating their speed, and also to the mismanagement of their helm at the moment of the approaching collision, ran foul of the Rowland Hill, the stern of the Crescent abaft the gangway, on her starboard side, coming into contact with the stem of the Rowland Hill, and carrying away the same. That the collision was occasioned by the inattention, mismanagement, and want of skill of the persons on board of the Crescent.

On the part of the Crescent it was pleaded, that at about the hour of seven in the morning, the Crescent was

CRESCENT. ROWLAND HILL.

on her downward trip from Montreal, the tide then being ebb, and the Rowland Hill about one hundred yards in front of the Crescent on the south side. That when the Rowland Hill was in front of St. Andrew's wharf, in the Lower Town of Quebec, she suddenly turned and crossed in front of the Crescent; which vessel could not within so short a time, and coming down with the tide—the space between the two vessels being so short—stop her engines; for, had she done so, she would have been cut in two by the Rowland Hill. That the Rowland Hill crossed the course of the Crescent, and made her sweep to come to the wharf at Quebec on the occasion propounded, sooner than is usual for steamboats to do when coming down to Quebec. That in consequence of so crossing, the Rowland Hill ran stem on against the Crescent, and came into collision with her, striking her within about fifteen feet of her stern, doing much damage thereto. That before coming into collision, the Rowland Hill was hailed from the Crescent, and requested to ease her engines, and back water, and that had she done so in time the collision would have been avoided. That from the time of the Rowland Hill first showing her intention to cross the course of the Crescent to the time of the collision—as well as from the vessels at anchor—it was impossible for the Crescent to stop her course. That the Crescent was preserving a direct course, and that the collision was wholly caused by the Rowland Hill crossing the course of the Crescent; and from the carelessness, unseamanship, and negligence of the crew of the Rowland Hill. That by the collision damage was done to the Crescent to the extent of 100*l.* currency; and that the master and crew well performed their duty; and that the collision was not caused by their carelessness or want of skill.

Friday, 4th November, 1853.

SARAH ANN—HOCKER.

SARAH ANN.

Where the collision was the effect of mere accident, or that overriding necessity which the law designates by the term *vis major*, and without any negligence or fault in any one, the owners of the ship injured must bear their own loss.

This was a cause of collision, promoted on behalf of the owner of the William against the Sarah Ann, for damage sustained in the harbour of Quebec, on the 11th of October last.

The libel given in and admitted on behalf of the promoter of the suit, set forth :—

That on the 11th of October last, the ship or vessel the William, whereof one John Till then was master, was lying at anchor in the river St. Lawrence, opposite to the city of Quebec, within the ebb and flow of the tide, having on board a full cargo of provisions, with which she was about to proceed to sea for a port in Newfoundland. That about three o'clock in the afternoon of that day, the ship or vessel the Sarah Ann came to anchor at flood tide, a-head and to the eastward of the William. That the Sarah Ann is a vessel of the burthen of about 500 tons, and had then on board a full cargo of merchandise, and was deep in the water. That from the time when the Sarah Ann so came to anchor to the eastward of the William, until the hour of twelve at noon on the following day, both vessels, at the different changes of the tide, sheered in the usual way clear of each other. That between the said hour of twelve at noon and the hour of

SARAH ANN. exertions of the persons on board the William, the two vessels were at last separated, and the Sarah Ann then sheered clear of the William, but the Sarah Ann was so negligently and unskilfully managed that she would again have run foul of the William, had not the persons on board of the Sarah Ann, at the urgent request of the master of the William, hoisted their main-top-mast-stay-sail, and by this means escaped a second collision; and that had the Sarah Ann, when she began to drag towards the William, adopted the like or similar means, and let go her second anchor, no collision would have at all occurred. That by the collision the Sarah Ann carried away the main-sail of the William from the night-heads to the fore-rigging, and about twenty feet of bulwark, and also her channel guard, damaged and started her covering boards, split and damaged four stanchions, head-rails and knees, and carried away her cat-head, block, and fall, and she was otherwise considerably damaged.

The responsive plea or allegation, on the part of the Sarah Ann, denied that the accident was occasioned by the mismanagement of those on board of her: on the contrary it was alleged :—

That about fifteen minutes after the hour of two in the afternoon of the 11th of October last, the Sarah Ann came to anchor opposite the city of Quebec, a-head and to the eastward of the William, and at a sufficient distance from the William to prevent accidents, and gave to the William a fair berth. That the Sarah Ann was a vessel of 377 tons, and had on board a full cargo, and was then ready for sea, merely requiring a trifling repair to one of her masts, which had since been made. That from the time when the Sarah Ann came to anchor to the eastward of the William until the hour of twelve of the following day, both vessels, at the different changes of the tide, sheered in the usual way clear of each other,

ROSLIN CASTLE. GLENCAIRN.

obtaining the assistance of a gentleman of the nautical profession in determining the following questions:

1. When the Roslin Castle and the Glencairn first saw each other, was there, or was there not, sufficient room and time for the Roslin Castle to have avoided all risk of a collision by putting her helm up, and bearing away?

2. Was there anything in the position of the Glencairn when first seen by the Roslin Castle, which justified the latter vessel in not immediately putting her helm up and bearing away; and if there was, was there, or was there not, still sufficient time and room for the Roslin Castle to have avoided all risk of a collision by putting her helm up, and bearing away as soon as she saw that the Glencairn was upon the starboard tack, and upon a wind; and if the Roslin Castle were justified in not putting her helm up, and bearing away, was she also right in putting her helm down, and luffing up as she neared the Glencairn?

3. Supposing that the Roslin Castle was, under the circumstances, justified in acting as she did, was the Glencairn justified in not bearing away, but on the contrary, putting her helm down and luffing up as the Roslin Castle neared her?

4. Did the collision occur from any negligence or want of skill, or any violation of any rule of navigation or of good seamanship, on the part of either and which of the vessels; or was it the result of over-riding circumstances over which neither vessel had any control, and for which neither is responsible?

In answer to these questions, Lieutenant Ed. D. Ashe, R.N., who had attended at the hearing of the case, as an assessor, delivered in a written opinion to the following effect:—

"From what has been said on both sides, it appears that the Glencairn was on the starboard tack, and that

NIAGARA. ELIZABETH.

Under these circumstances a collision took place between the Niagara and the Elizabeth; the Niagara, according to some of the witnesses, striking her cut-water against the starboard bow of the Elizabeth, but according to others, the starboard bow of each vessel striking the starboard bow of the other. The injury done to the Niagara is stated by her master to be, the starboard side of the top gallant forecastle started and several stanchions broken, the figure-head and cut-water broken, head rails and knees broken, windlass bits started, cat head broken, bowsprit and jib-boom carried away, fore-top mast and fore-yard and fore-top gallant yard broken, sails, standing and running rigging destroyed and broken forward, and all the gear connected with the bowsprit, main-top gallant mast and stays carried away, and the stock of the bower anchor broken. The injury done to the Elizabeth is stated by her master to have been done by the cut-water of the Niagara striking the starboard bow of the Elizabeth, and breaking seven of her timbers in the bow, the top-gallant rail and bulwarks, injuring the after-part of the fore-rigging, the main-top sail and cat-head breaking four planks, covering boards and two paint streaks, and also destroying the ceiling and water way, two chain plates and a great part of the fore-rigging, the bowsprit of the Niagara having run through it.

With regard to the circumstances which immediately preceded and occasioned the collision, the evidence, as usually occurs in like cases, is conflicting. Owen Evans, the boatswain and look-out man of the Niagara, says, "that he was on the top-gallant fore-castle of the vessel, walking from side to side, in order that he might see in every direction, when at about a quarter to seven, the Niagara having just passed a vessel to the southward at anchor, he saw two lights a-head, which he at first took for the lights of a vessel at anchor; he believes them to

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Harbour Master in the premises, or in any or either of them, and any wharfinger or other person who resists or opposes such Harbour Master in the execution of the duties thereby required of him, or of any or either of them, shall for each and every such offence incur and pay a penalty not exceeding ten pounds currency.

This being the law of the Harbour, it appears that on the 21st June last, the barque New York Packet was lying at Gillespie's wharf, in the harbour of Quebec, in a berth usually and properly assigned to a line of steamers, of which the Lady Elgin is one. In the afternoon of that day, the Lady Elgin having arrived, and it being necessary that the New York Packet should quit the berth so occupied by her, in order to allow the Lady Elgin to come into it; the master of the New York Packet applied to the Harbour Master, Captain Armstrong, telling him that he knew he had no right to retain the berth then occupied by his vessel, and requesting him to assign her a berth in the dock between Gillespie's wharf and St. Andrew's wharf, the next wharf above it. The Harbour Master had also been applied to on the same day by the agent of the Lady Elgin to have the New York Packet removed out of the Lady Elgin's berth. At about five o'clock the same afternoon, the Harbour Master went to the spot, and having caused the steamer Lord Sydenham—which then lay across the space between the two wharves so as to shut up the dock between them—to heave ahead, and to make an opening for the New York Packet to enter; the New York Packet was then, under his directions, hauled into the dock, and being placed in a diagonal direction with her larboard bow resting against the side of the Bremen ship Adlar, or Eagle, her starboard side about midships, resting against the larboard quarter of the Marie Celina, and a warp from her starboard bow, and another from her starboard quarter being made fast to the upper and outward

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is the refusal of the Marie Celina to heave ahead when requested to do so by the New York Packet, and that of the Storm King to allow her to do so. But the berths which these vessels occupied had been assigned or confirmed to them by the only competent authority, that is, the Harbour Master; who did not think proper, under the circumstances, to direct the Marie Celina to move ahead. Nor does it appear that the master of the New York Packet applied to the Harbour Master to direct the Marie Celina to heave ahead: on the contrary the Harbour Master expressly directed the New York Packet to remain in the position she then occupied for the night, warning the master at the same time of the damage which would be incurred if he attempted to haul further in. It is in evidence that the night was calm, that there was no appearance of bad weather, and that the Harbour Master considered the New York Packet perfectly snug till the morning. Since, under these circumstances, the New York Packet chose to set at naught, not merely the opinion but the positive injunction and warning of the Harbour Master, and thereby occasioned a very great damage to vessels which were in nowise in fault, and which contravened no order or rule of the harbour, it is only right that the New York Packet should bear the loss, which her violation of the Harbour Master's order brought upon innocent parties; and, therefore, however unfortunate it may be for her owner, I am of opinion that he must be made responsible.

It is evidently necessary, for the good of all, that there should be some officer clothed with sufficient authority to decide promptly all questions as to the berths or positions which vessels may occupy in a crowded harbour like that of Quebec; and this authority the Legislature, acting through the Trinity House, has devolved upon the Harbour Master. Any contravention of such authority must manifestly tend to general loss and inconvenience,

Saturday, 10th March, 1855.

ELECTRIC—MOLTON.

ELECTRIC. **In a case of very meritorious service rendered by two seamen and two young men to a vessel in the river St. Lawrence, the Court awarded one-sixth part of the property saved, and also their costs and expenses.**

This was a cause of salvage, promoted by Edward Hovington and Malcolm Hovington, and by Hubert Fraser on behalf of his minor sons Daniel Fraser and Elzéar Fraser, for services rendered to the barque Electric, stranded on Red Island shoal to the eastward of the island, on her homeward voyage in November, 1853. The circumstances of the case are fully noticed in the following judgment.

JUDGMENT.—*Hon. Henry Black.*

The Electric, John Molton, master, sailed from Quebec, on the 17th November, 1853, on a voyage to Bideford, a sea-port in Devonshire in England, and proceeded down the river St. Lawrence as far as Red Island, about one hundred and forty miles below Quebec. On the evening of the 22nd November, she grounded on Red Island shoal, to the eastward of the island, the weather being at that time more than usually inclement, and the ice forming round her and upon her, so as to prevent her from being worked, or moving. Notwithstanding the efforts of the master and crew, she remained fast during the 23rd, 24th, 25th, 26th and 27th. On the last mentioned day the master and crew left the vessel, being no longer able to endure the cold and the hardships to which they were subjected, some of them being disabled by

ELECTRIC. wind was then strong from the south-west or down the river, the night dark, and the weather very bad, with squalls and snow storms, and great cold; and they remain on board during the night. The vessel had drifted down about eighteen miles below Red Island, or nearly opposite the Esquamine islets, when about three o'clock in the morning the wind first slackened, and then changed to the north-east, with a moderate breeze, the ship nevertheless being always surrounded by ice. Taking advantage of this favourable opportunity, the salvors with some difficulty managed to set the sails, and direct their course up the river. Notwithstanding the difficulty of steering the vessel, the knowledge the Hovingtons had of the river, enabled them to avoid several very dangerous places, and finally to get the ship into Tadousac Bay, where they made her fast, and then stored away on shore her sails and rigging. The vessel was anchored, and remained afloat all the winter, and until she was delivered to the owner in the following spring, and proceeded on her voyage. It appears that in saving the vessel the Hovingtons lost their boat, which was crushed in the ice, and that the parties were engaged in the salvage service about nineteen or twenty hours; and the daring courage and skill exerted by the Hovingtons especially, were very great.

The only question to be determined is the amount to which the salvors are entitled. The several attempts at compromise, and conversations between the parties interested, which have been referred to in the evidence, amount in law to nothing; and against those parts of the evidence which tend to decry the value of the services rendered by the salvors, the Court is bound to take into consideration the fact that the protest made by the master, which would have contained a narrative of the facts when they were fresh in his memory, has not been produced; and that neither the master, the mate, nor any

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three and four in the afternoon she had nearly reached the place at which she intended to come to anchor. She had come up under her fore-sail, fore-top-sail, and main-top-sail; but having decided upon the place at which she was to anchor her main-top-sail was taken in, and she was proceeding under her fore-sail and fore-top-sail, the wind still light from the east, the tide ebbing, and the vessel having way enough to stem it, and to move past the land at the rate of from half a knot to a knot an hour. At the same time the steam tow boat, Lumber Merchant, was coming down the river from Montreal to Quebec, having the barque Universe, about 313 tons register in tow astern of her, with about 50 fathoms of tow rope. They were going six knots through the water, or about nine past the land with the tide. When the vessels came in sight of each other they were about a mile and a half or two miles apart, all three being somewhere about the centre of the channel; the witnesses examined on the part of the Universe saying that the Inga was a little to the north, or on the port-hand of the line on which the Lumber Merchant and Universe were proceeding; and the witnesses examined on the part of the Inga affirming, on the contrary, that the Inga was a little to the south of that line, or in other words that the Lumber Merchant and Universe were a little on her starboard bow. Both parties however agree that the vessels were nearly in a straight line. As they approached, the helm of the Inga was put a starboard which threw her head round towards the south. The Lumber Merchant and the Universe on the contrary put their helms a-port, which threw their heads also to the south, and the consequence was that the Lumber Merchant just cleared the Inga, leaving her on the port side; but the Universe and the Inga came into collision, the Inga's bow striking the port side of the Universe about the main rigging, doing considerable damage to both vessels. At the time of the collision the

INCA. under command: and the master of any steam vessel navigating any river or narrow channel shall keep as far as is practicable to that side of the fair-way or mid-channel thereof which lies on the starboard side of each vessel." This rule applies to all vessels without distinction, whether impelled by steam or by sails. Each vessel is to port her helm; the only exception being when by so doing she would be brought into danger, or if a sailing vessel the command over her will be lost. This it is evident is only the old rule and reasoning thrown into a general form and made applicable to all cases. The 296th and 297th sections of the British Shipping Act, which was passed on the 10th August, 1854, and came into force on the 1st May last (17 & 18 Vict. c. 104) contains the following enactment on this subject:—

"Whenever any ship, whether a steam or sailing ship, proceeding in one direction, meets another ship, whether a steam or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port so as to pass on the port side of each other; and this rule shall be obeyed by all steamships and by all sailing ships, whether on the port or starboard tack, and whether close-hauled or not, unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and, as regards sailing ships on the starboard tack close hauled, to the keeping such ships under command.

"Every steam ship, when navigating any narrow channel shall, whenever it is safe and practicable, keep to that side of the fair-way or mid-channel, which lies on the starboard side of such steamship."

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I think, then, that in the present case each vessel was bound to put her helm to port, unless there were some peculiar circumstances in the case which made it dangerous so to do, or rendered a deviation from the rule necessary or justifiable. Now, it appears that both the Inga and the steamer were perfectly under command, each had sufficient way to make her obey her helm immediately. By the evidence of the Inga's own people it would seem that she was, if at all, very little to the starboard side of the steamer and her tow; so little indeed that the master of the Inga himself admits that it was necessary to starboard the Inga's helm in order to get sufficiently out of the line of the steamer and her tow, to enable them to pass safely on the starboard side. On the other hand it is denied by the witnesses for the Universe that the Inga was at all to the southward; and it is certain, from what took place, that if the Inga had ported her helm, or even perhaps if she had continued in her course the collision would have been avoided; for, the Inga's people say that her helm was starboarded about two minutes before the collision, and in two minutes she must clearly have run more than half the length of the Universe to the southward; and if she had been half the length of the Universe less to the southward than she was at the time of the collision, it is equally clear that she would not have struck that ship; and if she had ported her helm she would have gone to the northward, and been still further out of danger: and even if the collision would not have been avoided the Inga would not have been in default, and would not have been responsible for the consequences. The case is not one of a sudden *rencontre* where there is no time for consideration; the vessels were undoubtedly seen by each other, at least ten minutes before they met (*e*). Neither is it a

(*e*) See the case of the General Steam Navigation Company *v.*

case where there was any danger to either in obeying the rule; the channel was wide enough, and both could have drawn to the starboard without risk of touching the ground or of encountering any other damage; and both were in charge of pilots who were bound to know the rules of the Trinity House and of the river. Under these circumstances I can have no hesitation in giving effect to a definite and easily observed rule, which appears extremely well adapted to insure safety; and in deciding that the collision arose from the failure of the Inga to obey it.

Stuart and *Vannovous*, for Universe.
Edward Jones, for Inga.

Mann, tried before Sir Frederick Pollock, Lord Chief Baron of the Exchequer, at the Summer Assizes at Croydon, 1853.

Friday, 13*th July*, 1855.

JOHN COUNTER—MILLER.

JOHN COUNTER. **COLLISION.—Liability of a steam-boat for collision between vessels one of which is towed by the steam-boat.**

This case involved the question of the liability of a steamboat towing a vessel, for damage and injuries caused by the vessel in tow coming in collision with another vessel. The facts will be found stated in the following opinion of the Court.

JUDGMENT.—*Hon. Henry Black.*

On the 22nd September last, the brig William Wilberforce, was lying at anchor on the ballast ground in the harbour of Quebec, well over to the north side of that place, and about the middle of the channel of the River St. Lawrence. A barque was at the same time lying at the ballast ground about two cables' length to the northward, or towards the Quebec shore, and a little lower down the river or astern of the brig. The wind was light from the south-west or down the river; and the tide was ebbing at the rate of about four miles an hour. At about two o'clock in the afternoon the steamer John Counter, belonging to the Wolfe Island Railroad and Canal Company, on her way from Montreal with the barges Onward and Utility in tow, rounded Pointe à Pizeau, and came in sight of the brig. From the evidence both of the pilot and master of the steamer, and of the people of the barges, it appears that they saw the

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brig and the barque when they were about two miles distant. The only discrepance as to the position of the vessels is, whether when the vessels were just within sight of each other, the steamer was on the port or on the starboard side of the brig. All the witnesses, however, agree that there was plenty of room and time for the steamer and her tows to pass to the south of the brig or on the port side, where there was nothing between the brig and the south shore.

The pilot of the steamer being of opinion that he could pass safely between the brig and the barque, and wishing, as he says, to save a certain distance in getting to the wharf, at which the steamer usually lay, determined, with the consent of the master, to make the attempt, and the steamer's helm was therefore put a starboard, which inclined her bow to the north shore; and she cleared the brig by about the steamer's breadth. The barge Onward, which was about eighty or a hundred feet astern of her did not clear the brig, but the barge's starboard side about midships struck the bow of the brig; the second barge (Utility) being about fifty or sixty feet astern with her stem struck the brig's larboard bow, the tow rope broke, and she swung alongside the brig. At the time of the collision the steamer and her tows were running down the river, with steam and tide together, at the rate of from ten to twelve knots, the barges being light. It does not appear that at the time the steamer's helm was put a starboard, any special direction was given to the barges, as to how they should steer, though the people of the steamer assert that they had been carelessly steered all the way down from Montreal.

From the circumstances of the collision it appears that the steamer really was, as is asserted by the witnesses for the brig, on the larboard or south side of the brig, when her pilot and master determined to endeavour to pass between the brig and the barque, and put her helm

JOHN COUNTER. had no power to do otherwise than follow in the best way they could; and having no intimation of her intended change of course, they could not be blamed even if,—which does not appear,—they did not follow her so quickly as they might have done, if they had been forewarned of her intention, and directed what to do.

The brig was at anchor, and therefore no blame can be imputed to her, and she was seen far enough off to allow ample time to avoid the collision, and there was ample room to do so; and therefore it cannot be said that the accident was unavoidable. The collision was the fault of those who had the power of avoiding it as the steamer undoubtedly had: and there is no proof that the barges or either of them had any such power. Cases may occur in which an accident may arise from the fault of the tow, without any error or mismanagement on the part of the tug, and in such case the tow alone must be answerable for consequences. Cases may also occur in which both are in fault, and in such cases both would be liable to the injured vessel, whatever might be their responsibility *inter se* (*c*). The present case is not any of these; the manœuvre which caused the accident was the spontaneous action of the steamer herself, compelled by no necessity of circumstances, and adopted solely for her advantage. There was a course open to her in which no damage could have occurred; one which it would have been easier and straighter for her to take after rounding Pointe à Pizeau; which would have been more consistent with the spirit of the Trinity House

(*c*) Opinion of Ch. J. Lemuel Shaw, of the Supreme Court of Massachusetts, 25th March, 1833, in Sproul *v.* Hemmingway, 1 Pickering's Reports, p. 1. Opinion of Judge Betts in the case of the steam tug-boat Express, 26th Feb. 1846, and that of Judge Nelson, one of the justices of the Supreme Court of the United States, on appeal in same case, 12th November, 1848, 6 Law Observer, pp. 435, 401.

Friday, 24th August, 1855.

MARY BANNATYNE—FERGUSON.

MARY BANNATYNE.

1. Where two ships, close hauled, on opposite tacks meet, and there would be danger of collision if each continued her course, the one on the port tack is to give way, and the other is to hold her course.

2. She is not to do this, if by so doing she would cause unnecessary risk to the other.

3. Neither is the other bound to obey the rule, if by so doing she would run into unavoidable or imminent danger; but if there be no such danger, the one on the starboard tack is entitled to the benefit of the rule.

4. The circumstances of the case examined, and no sufficient excuse being found for not following the rule, the vessel inflicting the injury condemned in damages and costs.

This suit was brought by the owners of the barque St. John against the barque Mary Bannatyne, to recover damages occasioned by a collision. The injury occurred on the 17th of June last, in the river St. Lawrence, a few miles below the island of Bic. The facts of the case sufficiently appear in the following opinion of the Court:—

JUDGMENT.—*Hon. Henry Black.*

On the night of the 16th and morning of the 17th June last, the barque St. John, of the burthen of 573 tons, David Blyth, master, and the barque Mary Bannatyne, of the burthen of 535 tons, James Ferguson, master, were in the river St. Lawrence, a few miles below the island of Bic; both were bound to Quebec, and the wind being adverse, they were both beating up, and close-hauled. They had seen each other on the 16th, and for several days before. It appears, also, that in the day-time of the 16th the two vessels crossed each other, passing within

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that she did not port her helm until she was within so short a distance that although she obeyed her helm, and went off the wind, yet it was too late to avoid the collision, and her stem struck the St. John on her port side, in the middle of the main rigging, her bowsprit running through the main-sail of the St. John, carrying away the main rigging and back stays, and everything belonging to the mizen mast, and doing the other damage complained of. After the collision the vessels separated.

The wind was between north and north-west, and it is admitted on both sides that the weather was generally clear, with showers of drizzling rain. The people of the Mary Bannatyne say in their defence that this rain obscured the weather to such an extent that it was not possible for them to see the St. John at a sufficient distance to avoid the collision, although there was a man expressly stationed on the forecastle as a look-out;—and this is, in fact, the whole amount of the defence. But, though the man who was at the wheel of the Mary Bannatyne when the accident occurred (Patrick Crahan) says, "that the most vigilant look-out could not, with the hazy and rainy weather which was experienced during the twenty minutes immediately preceding the collision, have seen a vessel to leeward at a greater distance than twice her length," yet all the other witnesses produced on behalf of the Mary Bannatyne, including the chief mate (James Watson), whose watch it was, state, that had the look-out been attentive he must have seen the St. John at a greater distance than he did; and we have in evidence, on the other side, that the St. John's people saw the Mary Bannatyne at the distance of about two miles and a half; and this evidence is the less liable to suspicion, inasmuch as it makes against the St. John, if there were any fault on her part, as it goes to prove that she had plenty of time to adopt any course which circumstances required. Neither does there seem any reason

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why the Mary Bannatyne should not see the St. John as soon as the St. John saw her; for neither ship was, in point of fact, any considerable distance to leeward or to windward of the other, otherwise they could not have met. The man who is stated to have had the look-out (Christopher Callaghan) is not produced; neither is another man (George Brew), who is said to have been one of the watch on deck; and although it is alleged that they had deserted, yet it does not appear that any search was made for them, or any attempt to obtain their evidence: and this is the more to be regretted, inasmuch as the mate, and all the other witnesses of the Mary Bannatyne, except one, throw the blame upon the look-out man. On the other hand, the master and every one of the watch of the St. John were examined, and agree in their statements, which appear to have been fairly made. Besides admitting that he saw the Mary Bannatyne two miles and a half off, the master of the St. John admits that he could have avoided the collision by altering his ship's course, if he had foreseen that the Mary Bannatyne would not alter hers.

The undoubted rule of navigation is, that where two ships, close-hauled, on opposite tacks meet, and there would be danger of collision if each continued her course, the one on the port tack shall give way, and the other shall hold her course. She is not to do this if by so doing she would cause unnecessary risk to the other. Neither is the other bound to obey the rule, if by so doing she would run into unavoidable or imminent danger; but if there be no such risk, the one on the starboard tack is entitled to the benefit of the rule. In the present instance there was certainly no such risk, and if the Mary Bannatyne had kept a good look-out she must have seen the St. John in time to port her helm and avoid her, which she could very easily have done. There is no allegation on the part of the Mary Bannatyne

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of any want of skill or infringement of nautical rule on the part of the St. John, and the master of the St. John had a right to suppose that the Mary Bannatyne saw him, and would obey the rule, and port her helm in sufficient time to avoid the accident, which it would have been time enough to do when he first hailed the Mary Bannatyne. If the St. John had put her helm a-starboard she might perhaps have avoided the accident, provided the Mary Bannatyne had kept her course; but if the Mary Bannatyne had put her helm a-port, as she was bound to do, the starboarding of the helm of the St. John would only have rendered the collision more certain. If the St. John had put her helm further a-port, she would have got into the wind, and the command over her would have been lost; nor is it alleged that her so doing would have avoided the collision: nor indeed was it likely that in the middle of the night, and in a sudden emergency, any very delicate manœuvre could be attempted, or its advantages or disadvantages calculated.

With respect to the alleged admissions of the master of the St. John to Mr. Rowbottom and Captain Vaughan, after the arrival of the vessel at Quebec, although as no such admissions were pleaded and it was therefore irregular to receive evidence of them, yet it may be observed that the admissions, if made, were made in a desultory conversation; and the principal one, that the accident was as much the fault of one vessel as the other, is directly contradicted by the evidence on oath of the person who is said to have made it. With respect to the admission that he saw the Mary Bannatyne half an hour before, and could have avoided the accident if he had altered his course, that is in no respect at variance with the master's evidence, and its effect has been already commented upon.

Even admitting, which seems probable, that the look-out man of the Mary Bannatyne was the only person to

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blame, and that the officers and crew did all that could be done when they knew the danger, this can make no difference, for, however much his negligence may be to be regretted, the ship is clearly responsible for the fault of her look-out.

It is to be remarked in reference to this point, that it is admitted on both sides that a considerable number of vessels were at that time beating up in the neighbourhood of the two vessels in question. They had crossed each other in the day-time of the 16th, on opposite tacks, and within the distance of 100 feet; so close, indeed, that the St. John, being then on the port tack, had to give way to the Mary Bannatyne; and it is admitted in the defensive allegation that the St. John had been seen by the Mary Bannatyne at about half-past 10 P.M. It was, therefore, almost certain that, when the two vessels went about,—which they did, and must necessarily have done, within a few hours afterwards,—they would meet or pass close to each other; and it was therefore especially incumbent on both to keep the best possible look-out, in order to avoid such an accident as actually occurred. Nothing but a very great difference in speed and power of working to windward could prevent their meeting as they did, and no such difference is shown to have existed, or was likely; on the contrary, the vessels appear to have been as nearly as possible equal in speed, and other sailing qualities, as indeed they were likely to be, being of the same class, tonnage, and rig. Under these circumstances, nothing but the utmost possible care could prevent the chance of collision, and the Mary Bannatyne being the ship which, in case of a meeting, would be bound to give way to the other, as being on the port tack, it was more especially incumbent on her to spare no pains to make her look-out efficient. From her construction and position it appears that it was very difficult for any one except a person on the forecastle to see an approaching vessel, and it would

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perhaps have been more prudent to have had more than one stationed there.

The decree must therefore be in favour of the owners of the St. John, and against the Mary Bannatyne.

Stuart and *Vannovous*, for the St. John.
Alleyn, for the Mary Bannatyne.

Friday, 12th *October*, 1855.

VARUNA—DAVIES.

VARUNA.

Seamen — Wages — Shipping Articles — Description of Voyage— Mercantile Marine Act of 1850—*Merchant Shipping Act of* 1854.

Where seamen shipped for a "voyage from the port of Liverpool to Constantinople, thence (if required) to any port or places in the Mediterranean or Black Seas, or wherever freight may offer, with liberty to call at a port for orders, and until her return to a final port of destination in the United Kingdom, or for a term not to exceed twelve months," and the ship went to Constantinople in prosecution of the contemplated voyage, and then returned to Malta, whence, instead of going to a final port of destination in the United Kingdom, she came direct to Quebec in search of freight, which she had failed to obtain at the ports at which she had previously been,—it was *held*, that coming to Quebec could not be considered a prosecution of the voyage under the 94th section of the Mercantile Marine Act of 1850, re-enacted by the 190th section of the Merchant Shipping Act of 1854.

The Court this day delivered its opinion in the above cause, to the following effect:—

JUDGMENT.—*Hon. Henry Black.*

Three suits for wages having been instituted by seamen against the ship Varuna, before two Justices of the Peace for the district of Quebec, the cases have been by the Justices referred to be adjudged by this Court. These cases turn purely upon the question whether the men are, under the 94th section of "The Mercantile Marine Act, 1850," or the 190th section of "The Merchant Shipping Act, 1854," entitled to sue for their wages on the ground that the voyage for which they engaged, and their engagement, have been terminated by the ship's having, as they allege, abandoned the voyage mentioned in the articles of agreement, and commenced another voyage for which

1854, which came into operation on the first of May last. The contract being dated before that day, must, I think, be considered with reference to the former, though it would, in law, make no difference, as the words of the two Acts are the same (*a*). VARUNA.

If the ship's coming to Quebec can, under the Act, be considered as a prosecution of the voyage under which these men shipped, then they are not entitled to sue here, and the case must be dismissed. If, on the contrary, the ship's coming to Quebec, cannot be held to be a prosecution of such voyage, then the voyage for which they engaged, is at an end by the act of the master or owners, and they must recover.

The language used by the legislature with regard to the description of the voyage, which must be inserted in the shipping articles, has been altered several times in the successive Acts; but the words of the Mercantile Marine Act, 1850 (13 & 14 Vict., c. 93), which was in force when the contract was entered into, are, that the articles shall mention, "the nature, and as far as practicable, the length of the voyage or engagement on which the ship is to be employed." The law which came in force on the first of May last (17 & 18 Vict. c. 104), but which does not however legally apply to these cases, is nearly the same. It requires that the agreement shall contain, "the nature, and, as far as practicable, the duration of the intended voyage or engagement." A voyage is a technical phrase, and imports a definite commencement, and end. In the present case, the commencement was Liverpool, and the end a final port of discharge in the United Kingdom. But the Act also requires that the nature of the voyage be stated, and in compliance with this requirement it is described in the articles as to Constantinople, thence, if required, to any ports and

(*a*) 13 & 14 Vict. c. 93, § 94, and 17 & 18 Vict. c. 104, § 190.

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places in the Mediterranean or Black Seas, or wherever freight might offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom: and as the Act also requires that as far as practicable the length of the voyage or engagement on which the ship is to be employed should be mentioned, the articles state a term not to exceed twelve months. The nature of a voyage undoubtedly consists in the place or places to which it is intended to be made; and the instrument in the present instance must be construed with reference to the description of the voyage given in it, as well as to the term of twelve months to which that voyage is to be limited. This term must be construed as a further limitation to the description of the voyage, and not as an alternative substituted for the previous description of its nature, authorising a voyage to any part of the globe to and from which the ship could go and return in twelve months. To construe it as such alternative would be to nullify the previous description of the nature of the voyage; which the Act requires as well as its probable length, showing clearly the intention of the Legislature that the nature of the voyage was a thing perfectly distinct from its mere length, and that both length and nature were of the essence of the contract, and must be stated. Now, I cannot think that a voyage to Quebec, through the Gulf of St. Lawrence in the north-western parts of the Atlantic Ocean, can be considered to be part of a voyage to a port or ports in the Mediterranean or Black Sea, in the south-eastern parts of another quarter of the globe.

The words "or wherever freight may offer," are to be construed with reference to the previous description of the voyage, and must be considered as meaning any ports or places in the two seas named in the articles, or some place in their immediate neighbourhood, or between them and the United Kingdom. Lord *Stowell's* expressions,

in commenting upon the application of the words "or elsewhere" in a parallel case, are remarkably apposite. He observes, that he has no hesitation in asserting, that they are not to be taken in that indefinite latitude in which they are expressed; they are no description of a voyage; they are an unlimited description of the navigable globe; and are not to be admitted as a universal alibi for the whole world, including the most remote, and even pestilential shores, indefinite otherwise both in space and time; they must receive a reasonable construction, which must be, to a certain extent, conformable to the necessities of commerce. The word "elsewhere" must, in its construction, vary much, according to the situation of the primary port of destination; if it is applied to a country remote from all neighbouring settlements, it is entitled to a larger construction; if to one that is surrounded by many adjacent ports, the limitation would be much narrowed: and I cannot help observing here, that the captain has deprived himself of an extensive latitude, by describing the primary port to be in the neighbourhood of many adjacent ports, which could supply cargoes (*b*). It appears to me that no reasoning can be more conclusive than this; and thinking, as I do, that the voyage of the Varuna to Quebec, is one which cannot come within the description of the intended voyage for which the men agreed, but is a departure from that voyage, and the substitution of a new and perfectly different one, by which departure and substitution the contract between them and the master is terminated, I am of opinion that the men are entitled to recover their wages at this port; and I accordingly overrule the protest of the master by which their right so to recover has been contested (*c*).

Charles Alleyn, for seamen.
Richard Pope, for ship.

(*b*) The Minerva, 1 Hagg. 361.

(*c*) In interpreting the Act of Parliament the words "nature of the voyage" must have such a

(A)

COMMISSION OF VICE-ADMIRAL.

George the Third, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, To our beloved James Murray, Esquire, our Captain-General and Governor-in-Chief in and over our Province of Quebec, in America,—greeting.

Commission to be vice-admiral, commissary, and deputy in the office of vice-admiralty in the province of Quebec.

We, confiding very much in your fidelity, care, and circumspection in this behalf, do, by these presents, which are to continue during our pleasure only, constitute and depute you, the said James Murray, Esquire, our Captain-General and Governor-in-Chief aforesaid, our Vice-Admiral, Commissary, and Deputy in the Office of Vice-Admiralty in our Province of Quebec aforesaid, and territories thereon depending, and in the maritime parts of the same and thereto adjoining whatsoever; with power of taking and receiving all and every the fees, profits, advantages, emoluments, commodities, and appurtenances whatsoever due and belonging to the said office of vice-admiral, commissary and deputy in our said province of Quebec, and territories depending thereon, and maritime parts of the same and adjoining to them whatsoever, according to the ordinances and statutes of our High Court of Admiralty in England.

To what places vice-admiral's jurisdiction shall extend.

And we do hereby remit and grant unto you, the aforesaid James Murray, Esquire, our power and authority in and throughout our province of Quebec afore-mentioned, and territories thereof, and maritime parts whatsoever of the same and thereto adjacent, and also throughout all and every the sea-shores, public streams, ports, fresh-water rivers, creeks, and arms as well of the sea as of the rivers and coasts whatsoever of our said province of Quebec, and territories dependent thereon, and maritime parts whatsoever of the same and thereto adjacent, as well within liberties and franchises as without;

In what causes.

to take cognizance of, and proceed in, all causes civil and maritime, and in complaints, contracts, offences, or suspected offences, crimes, pleas, debts, exchanges, accounts, charter-parties, agreements, suits, trespasses, injuries, extortions, and demands, and business, civil and

Between what persons.

maritime whatsoever, commenced or to be commenced between merchants, or between owners and proprietors of ships and other vessels, and merchants or others whomsoever with such owners and proprietors of ships and all other vessels whatsoever employed or used within the maritime jurisdiction of our vice-admiralty of our said province of Quebec, and territories depending on the same, or between any

preservation of our navy royal, and of the fleets and vessels of our kingdom and dominions aforesaid, as of whatsoever fishes increasing in the rivers and places aforesaid.

And also to keep, and cause to be executed and kept, in our said province of Quebec, and territories thereunto belonging, and maritime parts thereof and thereto adjacent whatsoever, the rights, statutes, laws, ordinances, and customs anciently observed.

And to do, exercise, expedite, and execute all and singular other things in the premises, and every of them, as they by right, and according to the laws and statutes, ordinances and customs aforesaid, should be done.

And to reform nets that are too close, and other unlawful engines for catching fish. And to punish those who make use of them.

And moreover, to reform nets too close, and other unlawful engines or instruments whatsoever for the catching of fishes wheresoever, by sea, or public streams, ports, rivers, fresh waters, or creeks whatsoever, throughout our province of Quebec aforesaid, and territories depending thereon, and maritime parts of the same and thereto adjacent, used or exercised within our maritime jurisdictions aforesaid wheresoever. And to punish and correct the exercisers and occupiers thereof, according to the statutes, laws, ordinances, and customs aforesaid.

And to pronounce sentences in all causes relating to the sea, and put the same in execution. And to proceed in the said causes as well of mere office as at the instance of parties.

And to pronounce, promulge, and interpose all manner of sentences and decrees, and to put the same in execution; with cognizance and jurisdiction of whatsoever other causes, civil and maritime, which relate to the sea, or which any manner of ways respect or concern the sea, or passage over the same, or naval or maritime voyages, or our said maritime jurisdiction, or the places or limits of our said admiralty, and cognizance afore-mentioned, and all other things done or to be done.

With power also to proceed in the same, according to the statutes, laws, ordinances, and customs aforesaid anciently used, as well of mere office mixt or promoted, as at the instance of any party, as the case shall require and seem convenient; and likewise with cognizance and decision of wreck of the sea, and of the death, drowning, and view of dead bodies of all persons howsoever killed, or drowned, or murdered, or which shall happen to be killed, drowned, or murdered, or by any other means come to their death in the sea or public streams, ports, fresh waters, or creeks whatsoever, within the flowing of the sea and high-water mark throughout our aforesaid province of Quebec, and territories thereunto belonging, and maritime part of the same and thereto adjacent, or elsewhere within our maritime jurisdiction aforesaid.

And to have cognisance of wreck of the sea, and view of dead bodies of persons coming to their deaths upon the sea or within the maritime jurisdiction.

And to have cognizance of mayhem within the maritime jurisdiction.

Together with the cognizance of mayhem in the aforesaid places, within our maritime jurisdiction aforesaid, and flowing of the sea and water there happening; with power also of punishing all delinquents in that kind according to the exigencies of the law and customs aforesaid.

said, and territories thereunto belonging, and maritime parts of the same and thereto adjoining, under pain of the law, and the peril which will fall thereon.

Given at London in the High Court of our Admiralty of England aforesaid, under the Great Seal thereof, the nineteenth day of March in the year of our Lord, one thousand seven hundred and sixty-four and of our reign the fourth.

(Signed) GODF. LEE TARRANT,
Registrar.

(B)

LETTERS PATENT APPOINTING JUDGE.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To Our well beloved Henry Black, Esq.,—Greeting.

We do by these presents, make, ordain, nominate and appoint you, the said Henry Black, to be our commissary in our Vice-Admiralty Court, in our province of Lower Canada, in America, and territories thereunto belonging. And we do hereby grant unto you full power to take cognizance of, and proceed in, all causes civil and maritime, and in complaints, contracts, offences, or suspected offences, crimes, pleas, debts, exchanges, policies of assurances, accounts, charter parties, agreements, bills of lading of ships, and all matters and contracts, which in any manner whatsoever relate to freight due for ships hired and let out, and transport money or maritime usury, otherwise bottomry, or which do any ways concern suits, trespasses, injuries, extortions, demands, and affairs civil and maritime whatsoever, between merchants, or between owners and proprietors of ships or other vessels, and merchandises, or other persons whomsoever, with such owners and proprietors of ships and all other vessels whatsoever, employed or used, or between any other persons howsoever, had, began, made or contracted, for any matter, cause or thing, business or injury whatsoever, done or to be done as well in, upon or by the sea or public streams, fresh waters, ports, rivers, creeks and places overflowed whatsoever, within the ebbing and flowing of the sea, or high water mark, as upon any of the shores or banks adjoining to them or either of them, together with all and singular their incidents, emergents, dependencies, annexed and connexed causes whatsoever:—and such causes, complaints, contracts, and other the premises aforesaid, or any of them, howsoever the same

tracts, causes, contempts, and offences whatsoever, howsoever contracted or arising, so that the goods or persons of the debtors may be found within the jurisdiction of the Vice-Admiralty Court in our province of Lower Canada aforesaid, according to the civil and maritime laws and customs of our said High Court of Admiralty of England anciently used, and by all other lawful ways, means, and methods, according to the best of your skill and knowledge; and all such causes and contracts to hear, examine, discuss, and finally determine, (saving nevertheless the right of appealing to us in Council, and saving always the right of our said High Court of Admiralty of England, and of the judge and registrar of our said court, from whom or either of them it is not our intention in any thing to derogate by these presents), and also to arrest, and cause and command to be arrested all ships, persons, things, goods, wares, and merchandises for the premises, and every of them, and for other causes whatsoever concerning the same, wheresoever they shall be met with or found within our province of Lower Canada, aforesaid, and maritime parts thereof, either within liberties or without, and to compel all manner of persons in that behalf, as the case shall require, to appear and to answer; with power of using any temporal coercion, and of inflicting any other penalty or mulct, according to the laws and customs aforesaid, and to do and minister justice according to the right order and course of the law, summarily and plainly, looking only into the truth of the fact. And we empower you in this behalf to fine, correct, punish, chastise and reform and imprison, and cause and command to be imprisoned in any gaol, being within our province of Lower Canada, aforesaid, and maritime parts of the same, the parties guilty and violators of the law and jurisdiction of our Admiralty aforesaid, and usurpers, delinquents, and contumacious absenters, masters of ships, mariners, rowers, fishermen, shipwrights, and other workmen and artificers whomsoever, exercising any kind of maritime affairs, as well according to the afore-mentioned civil and maritime laws and ordinances and customs aforesaid, and their demerits, as according to the statutes and ordinances aforesaid, and those of our United Kingdom of Great Britain and Ireland, for the Admiralty of England in that behalf made and provided. And to deliver and absolutely discharge, and command to be discharged whatsoever other persons imprisoned in such cases, who are to be delivered, and to promulge and interpose all manner of sentences and decrees, and to put the same in execution; with cognizance and jurisdiction of whatsoever other causes, civil and maritime, which relate to the sea, or which in any manner of ways respect or concern the sea or passage over the same, or naval or maritime voyages performed or to be performed, or the maritime jurisdiction aforesaid; with power also to proceed in the same, according to the civil and maritime laws and customs of our aforesaid court anciently

such manner as by the said Act of the seventh year of the reign of his Majesty King George the Fourth is provided in that behalf; and have also appointed you, or any three of you (of which number our will and pleasure is that our said governor general, governor, lieutenant governor or other officer administering the said government, our said chief justice, our said other judges or one of them, or our judge of our said Court of Vice-Admiralty respectively, for the time being, shall always be one), our commissioners to inquire upon the oath of good and lawful men of our said province, and by other ways, means and methods, according to your best knowledge and ability, as well within liberties as without, whereby the truth of the matter may be the better known and inquired into, concerning all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences whatsoever, and accessaries thereto, whomsoever and howsoever done or committed, or hereafter to be done or committed upon the sea, or in any haven, river, creek or other place where the admiral has power, authority, or jurisdiction; and also concerning all offences against the said recited Act of the fifth year of the reign of King George the Fourth which shall be committed in any place where the admiral has not jurisdiction, and not being within this our United Kingdom, nor within the local jurisdiction of any ordinary court of a British colony, settlement, plantation or territory competent to try such offences: and to hear and determine all the offences aforesaid according to the laws and customs of this our realm, and the statutes hereinbefore mentioned, and all other statutes in that behalf made and provided; and therefore we command you, that you and each of you diligently discharge the respective duties of taking informations, and of apprehension, commitment, and bailment as aforesaid: and that at certain times and places which shall be prefixed for this purpose by you or any three of you, at the least (of which number our said governor general, governor, lieutenant governor, or other officer administering the government, our said chief justice, our said other judges, or one of them, or our said judge of our said Court of Vice-Admiralty, respectively, for the time being, shall always be one), you diligently inquire of, try and determine all the said premises, and do in manner aforesaid all things to be done thereupon as appertains to justice, according to the said laws, customs and statutes of this our realm: and we do by these presents command, that it be in our name strictly enjoined to the provost marshal, or other proper officer of our said province, and others whom it may concern and to every of them, as well within liberties as without, that at certain times and places, when and as often as need shall require, which our said governor general, governor, lieutenant governor, or other officer administering the said government, for the time being, shall make known to them or either of them in form aforesaid, they cause to come before you or any three of you, at the least (of which number our said governor general,

whatsoever, done or to be done upon the sea or public streams, fresh waters, ports, rivers, creeks, and places overflowed whatsoever, within the ebbing and flowing of the sea;" provided, as in this case, the proceedings are against the thing in specie.

After giving this case every consideration due to the importance of the question proposed, I have no hesitation in pronouncing a decree, maintaining the ancient jurisdiction of the Admiralty over the river St. Lawrence, and dismissing this exception with costs (*a*).

Declinatory exception dismissed.

21*st July*, 1832.

COLDSTREAM—HALL.

In an Action against the Captain of a Ship chartered by the East India Company for an Assault and False Imprisonment,—a Justification on the ground of mutinous, disobedient, and disorderly behaviour sustained.

This was a suit brought by William Warr, seaman, against the captain and first officer of the ship Coldstream, chartered by the East India Company, to recover compensation in damages for an assault and false imprisonment, alleged to have been inflicted on the voyage from China to the port of Quebec. The summary petition, besides a prayer to award 200*l.* damages, concluded for the payment of the promovent's wages, and a rescision of the articles, so far as respected him, on the ground of ill treatment. The defendants, by their responsive allegation, justified on the plea of mutinous, disobedient, and disorderly behaviour.

JUDGMENT.—*Judge Kerr.*

There has been laid before the Court, as is not unusual in suits similar to this, much contradictory evidence; but the circumstances, as they appear to me, are the following:—

On the night of the 25th May last, when the Coldstream was near the banks of Newfoundland, she experienced a strong gale of wind, and all hands were ordered to take in the foresail; when the gear was sufficiently up for furling, and everything prepared, the men were sent up on the yard to furl the sail. When they were upon the yard, Warr, who was aloft, called out that if the ship were not kept away before the wind they could not furl the sail. Taylor, who had

(*a*) See statute of Imperial Parliament, 2 Wm. 4, c. 51, s. 6. (Passed 23rd June, 1832.)

punished, the captain seized him rudely by the lips; and that previouly to his being flogged, no intimation was given to the crew as to the cause of his punishment. On both points, however, the promovent's witnesses are contradicted. On the second, by Scott, the promovent's witness, and by Mr. Solby, the third officer; and on the first point, the fact is explained away by many of the defendant's witnesses, who swear that when Warr was brought to the gangway, his language was so abusive and seditious, that the captain only put his hand on his mouth to prevent the continuation of it.

The promovent's advocates have relied on the testimony of some of the crew, who swear that the behaviour of Warr was always respectful and obedient; and particularly on that of Goddard, the boatswain's mate, who is pleased to say that Warr is a civil, honest, and quiet man, and that he never uttered a bad word. But how is this to be reconciled with the evidence of Walsh,—who appears throughout this matter to have been a co-ringleader,—for he swears that when the captain said several abusive words to Warr, he made a reply to some of them, and that he persisted in speaking until he was threatened to be gagged. Walsh does not mention the promovent's words, but other witnesses supply the deficiency; for Dyer, the sailmaker, says, that when the captain desired him to hold his peace, he told him that he had spoken in the company of gentlemen, where he, the captain, durst not show his face; and he had been flogged in a better ship, and by a better man, and by his, Captain Hall's, master. That during this time, to use the witness's own expression, Warr "bobbed his head in the captain's face." He further says, that, though he had been eleven years at sea, he never saw a captain so insulted. To the same effect is the testimony of Davenport, the carpenter, who says that Warr's conduct was mutinous, desperate, and outrageous. That when he was brought up to be flogged, his tone and manner were unruly, disrespectful; and that though he, the witness, had been ten years at sea, he never saw such unruly conduct. So says Solby, the third officer, who states that Warr insultingly said to the captain, "I have spoken to your masters on His Majesty's quarter-deck." And that on all occasions of dissatisfaction among the men, Warr was always the spokesman. In this they are corroborated by Comyn and Sewell, the midshipmen; the first of whom says, that the captain repeatedly told Warr to hold his tongue, which he refused to do, insisting to speak, and at the same time pushing his head, to use his words, in the captain's face; that he never addressed the captain by the word "Sir;" and that his gestures and deportment were so menacing, that he appeared to the witness to have thereby intended to provoke the captain to some act of violence.

The counsel for the promovent have called in question the right of the master, under any circumstances of misbehaviour, to inflict

on the night of the 25th of May, or that such is the habit of his life. I have patiently gone through the evidence on both sides, and the result is, that I decree this suit to be dismissed, and condemn the promovent to pay expenses (*b*).

Ussher and *Aylwin*, for the promovent.
Black, for the respondents.

(E)

VICE-ADMIRALS

Since the Cession of Canada, by His Most Christian Majesty, to the Crown of Great Britain, under the Treaty of Peace, concluded at Paris, the 10th day of February, 1763, with the dates of their Commissions.

James Murray	19	March,	1764
Guy Carleton	23	April,	1768
Guy Carleton	30	December,	1774
Frederick Haldimand	16	September,	1777
Guy Carleton (Lord Dorchester)	4	May,	1786
Robert Prescott	13	December,	1796
Sir James Henry Craig	9	December,	1807
Sir George Prevost	16	November,	1811
Sir Gordon Drummond	4	January,	1815
Sir John Coape Sherbrooke	1	June,	1816
Duke of Richmond	23	May,	1818
Earl of Dalhousie	19	May,	1820
Lord Aylmer	6	October,	1830
Lord Gosford	20	June,	1835
Earl of Durham	3	April,	1838
Charles Poulett Thompson (Lord Sydenham)	6	September,	1839
Sir Charles Bagot	28	September,	1841
Sir Charles Theophilus Metcalf (Lord Metcalf)	1	March,	1843
Earl of Elgin	2	October,	1846
Sir Edmund Walker Head	21	September,	1854

(*b*) By an Act of Congress, passed 28th September, 1850, "flogging in the Navy, and on board vessels of commerce, was abolished from and after the passing of the Act."—Acts 31 Cong. ch. 80.

been regularly attached. *The Friends —Duncan*, 72.

2. Application for an attachment for contempt for resisting the process of the court rejected; the statement of the officer being contradicted by the affidavits of two other persons present at the arrest. *The Sarah—Sinclair*, 86.

3. Application for an attachment for a contempt against a magistrate, first seized of a seaman's suit, for having issued a warrant, and arrested the seaman whilst attending his proctor for the purpose of bringing the suit, rejected. *The Isabella—Miller*, 134.

4. Attachment decreed for contempt, in obstructing the marshal in the execution of the process of the court. *The Delta—Murray*, 207.

ATTORNEY-GENERAL.

During the absence of the Attorney-General, the powers and duties of the office devolve upon the Solicitor-General. *The Dumfriesshire—Gowan*, 245.

BAIL.

The bail of a party is an incompetent witness on his behalf *Sophia—Weatherall*, 219.

BATEAU.

See JURISDICTION, 12.

BAYFIELD (ADMIRAL).

See ASSESSORS.

BOXER (ADMIRAL).

See ASSESSORS.

COLOURS.

See UNION JACK.

COLLISION.

1. There are four probabilities under which a collision may occur.

1. It may occur from the fault or misconduct of the vessel suffering from the collision.
2. Or, the accident may have happened from unavoidable circumstances, without fault on the part of either vessel.
3. Or, both parties may be to blame, as where there has been a want of skill or due diligence on both sides.
4. Or, the loss and damage may be owing to the fault or misconduct of the vessel charged as the wrong-doer.

In the first two cases, no action lies for the damage arising from the collision.

In the third case, the law apportions the loss between the parties, as having been occasioned by the fault of both of them.

In the fourth case, the injured party is entitled to full compensation from the party inflicting the injury. *The Cumberland—Tickle*, 75; *The Nelson Village—Power*, 156.

2. Owners of vessel are not exempt from their legal responsibility, notwithstanding that their vessel was under the care and management of a pilot. *The Cumberland—Tickle*, 75.

3. Vessel giving a foul berth to another vessel, liable in damages

tion is gross negligence, or want of skill, and the burthen is cast on the ship-master to repel that presumption, *ib.*

18. How ships moored are protected against the intrusion of ships under sail, 241.

19. The omission to have a light on board in a river or harbour at night, amounts to negligence, *per se*. *The Dahlia—Grossard*, 242.

20. Every night in the absence of a moon is a dark night in the purview of the Trinity House regulations of the 28th June, 1805, *ib.*

21. More credit is to be attached to the crew that are on the alert than to the crew of the vessel that is placed at rest, *ib.*

22. The regulations of the Trinity House require a strict construction in favour of their application, *ib.*

23. Having a light on board in such case an indispensable precaution, *ib.*

24. In a cause of collision, where the loss was charged to be owing to negligence, malice, or want of skill, the Court, with the assistance of a captain in the Royal Navy, being of opinion that the damage was occasioned by accident, chiefly imputable to the imprudence of the injured vessel, and not to the misconduct of the other vessel, dismissed the owners of the latter vessel, with costs. *The Leonidas—Arnold*, 226.

25. The general rule of navigation is, when a ship is in stays, or in the act of going about, as she becomes for the time unmanageable, it is the duty of any ship that is near her to give her sufficient room, *ib.*

26. But, when a ship goes about very near to another, and without giving any preparatory indication from which that other can, under the circumstances, be warned in time to make the necessary preparations for giving room, the damage consequent upon want of sufficient room may arise from the fault of those in charge of the ship going about at an improper time or place, *ib.*

27. Or, in the case of darkness, fog, or other circumstances rendering it impossible for the ships to see each other so distinctly as to watch each other's evolutions, the fault may be with neither, *ib.*

28. If it be practicable for a vessel which is following close upon the track of another to pursue a course which is safe, and she adopts one which is perilous, then if mischief ensue she is answerable for all consequences. *The John Munn—Richardson*, 265.

29. In a cause of collision between two steam-vessels, the Court, assisted by a captain in the Royal Navy, pronounced for damages and costs, holding that the one which crossed the course of the other was to blame. *The By-town—Humphrey*, 278.

30. Where it appeared that the collision was the effect of mere accident, or that over-riding necessity which the law designates by the term *vis major*, action dismissed, with costs. *The Sarah Anne—Hocker*, 294.

on opposite tacks meet, and there would be danger of collision if each continued her course; the one on the port tack shall give way, and the other shall hold her course. *The Mary—Bannatyne*, 350.

60. She is not to do this, if by so doing she would cause unnecessary risk to the other, *ib.*

61. Neither is the other bound to obey the rule, if by so doing she would run into unavoidable or imminent danger; but if there be no such danger the one on the starboard tack is entitled to the benefit of the rule, *ib.*

62. The circumstances of the case examined, and no sufficient excuse being found for not following the rule, the vessel inflicting the injury condemned in damages and costs, *ib.*

63. The Court of Vice-Admiralty exercises jurisdiction in the case of a vessel injured by collision in the river St. Lawrence, near the City of Quebec. *The Camillus—Baird*, 383. (Doubts which had arisen on this head removed by 2 W. 4, c. 51, s. 6.)

COMMISSIONS.

1. Commission of Vice-Admiral in and over the Province of Quebec, under the Great Seal of the High Court of Admiralty of England, dated 19th March, 1764, 370.

2. Commission of Judge of the Vice-Admiralty Court in the Province of Lower Canada, under the Great Seal of the High Court of Admiralty of England, dated 27th October, 1838, 376.

3. Commission under the Great Seal of the United Kingdom of Great Britain and Ireland, for the trial of offences committed within the Admiralty jurisdiction, dated 30th October, 1841, 380.

CONFLICTING DECISIONS.

1. Conflicting decisions of Doctor Lushington in the case of *The City of London*, and of Judge Sprague, in the case of *The Osprey*. See the case of *The Inga*.

CONSIDERATION.

[See MARINERS' CONTRACT, 2.

CONSOLATO DEL MARE.

The 148th and 149th capitoli of the *consolato del mare* declare that the sale of the ship, or the change of the master operate as a discharge of the seamen. *The Scotia—Risk*, 166.

See SALE OF SHIP; OWNERS.

CONSTRUCTION.

See MARINERS' CONTRACT.

COSTS.

Court may exercise a legal discretion as to costs. Costs refused in this case, *The Agnes—Taylor*, 57.

If a suit be brought by a seaman for wages, a settlement without the concurrence of the promoter's proctor does not bar the claim for costs: the Court will inquire whether the arrangement was or was not reasonable and just, and relieve the proctor if it were not so. *The Thetis—Watkinson*, 363.

material men for necessaries furnished to foreign ships. *The Mary Jane—Trescowthick*, 271.

FORFEITURE AND PENALTIES.

1. Jurisdiction in the case of forfeitures and penalties incurred by a breach of any act of the Imperial Parliament, relating to the trade and revenues of the British possessions abroad.

See VICE-ADMIRALTY COURT, 5.

2. Jurisdiction in the case of forfeitures and penalties incurred by a breach of any act of the Provincial Parliament, relating to the customs as to trade or navigation.

See VICE-ADMIRALTY COURT, 6.

3. Under the act regulating the trade of the British possessions abroad, no suit for the recovery of any penalty or forfeiture to be commenced, except in the name of some superior officer of the Customs or Navy, or by his Majesty's Advocate or Attorney-General for the place where such suit shall be commenced. *The Dumfriesshire—Gowan*, 245.

HARBOUR OF QUEBEC.

1. Personal torts committed in the harbour of Quebec, are not within the jurisdiction of the Admiralty. *The Friends—Duncan*, 112.

2. Damages awarded in case of collision in the harbour of Quebec. *The Lord John Russell — Young*, 190.

3. A vessel which had moored alongside of another at a wharf in the harbour of Quebec, made responsible to the other for injuries resulting from her proximity.—*The New York Packet—Marshead*, 325.

4. Declinatory exception overruled, in a suit for an injury done by collision in the harbour of Quebec. *The Camillus—Baird*, 383.

See HARBOUR MASTER.

HARBOUR MASTER.

1. The rules of the Trinity House of Quebec empower the harbour-master to station all ships or vessels which come to the harbour of Quebec, or haul into any of the wharves within the limits of the same; and to regulate the mooring and fastening, and shifting and removal of such ships and vessels; and to determine how far and in what instances it is the duty of masters and other persons having charge of such ships or vessels to accommodate each other in their respective situations, and to determine all disputes which may arise concerning the premises. *The New York Packet — Marshead*, 325.

2. Owner of vessel contravening harbour-master's order condemned in damages for a collision, *ib.*

JUDGE.

Commission of the Judge of the Vice-Admiralty Court of Lower Canada, 376.

Judges since the cession of the country by the crown of France to that of Great Britain, 391.

St. Lawrence, near the city of Quebec. *The Camillus—Baird*, 383.

17. In the case of forfeitures and penalties incurred by a breach of any Act of the Imperial Parliament relating to the trade and revenues of the British possessions abroad.

See VICE-ADMIRALTY COURT, 5.

18. In the case of forfeitures and penalties incurred by a breach of any Act of the Provincial Parliament, relating to the customs, or to trade, or navigation.

See VICE-ADMIRALTY COURT, 6.

JUSTICES OF THE PEACE.

1. Although justices of the peace exercising summary jurisdiction be the sole judges of the weight of evidence given before them, and no other of the Queen's Courts will examine whether they have formed the right conclusion from it or not, yet other Courts may and ought to examine whether the premises stated by the justice are such as will warrant their conclusion in point of law. *The Scotia—Risk*, 160.

2. Justices of the peace cannot give themselves jurisdiction in a particular case, by finding that as a fact which is not a fact, *ib.* 164.

3. Where a justice of the peace acting under the authority of the Merchant Seamen's Act (5 & 6 W. 4, c. 19, s. 17) had awarded wages to a seaman on the ground that a change of owners had the effect of discharging the seaman from his contract, this Court—considering that the proceedings had before the justice of the peace did not preclude it from again entering into the inquiry—*held* that the contract of the seaman was a subsisting contract with the ship, notwithstanding the sale of her, *ib.*

4. In no form can this Court be made ancillary to the justice's court, still less be required to adopt, without examination, as legal premises on one demand, the premises which the justice's court may have adopted as legal premises on another demand, *ib.* 165.

5. In a suit for the recovery of wages under the sum of fifty pounds, justices acting under the authority of "The Merchant Shipping Act, 1854", (17 & 18 Vict. c. 104, ss. 188, 189), may refer the case to be adjudged by this Court. *The Varuna—Davies*, 357.

JUSTIFICATION.

In action by a seaman against the master, a justification on the ground of mutinous, disobedient, and disorderly behaviour sustained. *The Coldstream—Hall*, 386.

KERR (JUDGE).

1. Appointed Judge of the Vice-Admiralty Court at Quebec, by letters patent, under the Great Seal of the High Court of Admiralty of England, on the 19th of August, 1797, 152.

2. His duties discharged by a deputy from the 30th of August 1833, until his removal in October, 1834.

3. Two of his decisions in the Vice-Admiralty Court.—*Appendix*, 383.

tainty, or as subordinate to the principal voyage stated in the preceding words, *ib.* 361.

MARITIME LIEN.

1. The definition and nature of maritime liens, their duration and extinguishment. *The Hercyna — O'Brien* (in note), 275.

2. There seems to be no fixed limit to the duration of a maritime lien; but must be enforced within an equitable period, considering the nature of the lien, and the employment of the vessel, and the changes of interest therein, *ib.*

See LIEN.

MASTER OF SHIP.

1. Master admitted as a witness in a case of pilotage. *The Sophia—Easton*, 96.

2. A promise made by the master at an intermediate port on the voyage to give an additional sum over and above the stipulated wages in the articles, is void for want of consideration. *The Lockwoods—Lawton*, 123.

3. Upon the death of the master during the voyage, the mate succeeds him as *hæres necessarius. The Brunswick—Tully*, 139.

4. Possession of a ship awarded to the master appointed by the owner to the exclusion of the master named by the shippers of the cargo. *The Mary and Dorothy — Teasdale*, 187.

5. By the 17 & 18 Vict. c. 104, s. 240, power is given to any Court having Admiralty jurisdiction in any of Her Majesty's dominions to remove the master of any ship, being within the jurisdiction of such Court, and to appoint a new master in his stead, in certain cases, *ib.* 189.

6. The master of a merchant vessel may apply personal chastisement to the crew whilst at sea, the master thereby assuming to himself the responsibility which belongs to the punishment being necessary for the due maintenance of subordination and discipline, and that it was applied with becoming moderation. *The Coldstream—Hall*, 386.

See ADMIRALTY; EVIDENCE; JURISDICTION; PATRONE; PASSENGER; PERSONAL DAMAGE; SEAMEN; TORTS; VICE-ADMIRALTY; WITNESS.

MATE.

1. The mate of a vessel is chargeable for the value of articles lost by his inattention and carelessness, and the amount may be deducted from his wages. *The Papineau—Maxwell*, 94.

2. A chief mate suing for wages in the Court of Admiralty is bound to show that he has discharged the duties of that situation with fidelity to his employers, *ib.* (in note).

3. Amongst the most important of these duties are a due vigilance, care, and attention to preserve the cargo, *ib.* (in notes), 95.

4. Where a second mate is raised to the rank of a chief mate by the master during the voyage, he may be reduced to his old rank by the

the jurisdiction of the Admiralty, 380.

ONUS PROBANDI.

1. Where a ship at anchor is run down by another vessel under sail, the *onus probandi* lies with the vessel under sail to show that the collision was not occasioned by any error or default upon her part. *The Miramichi —Grieve*, 240.

2. Where a vessel at anchor is run down by another, the onus lies on the latter to prove the collision arose from some cause which would exempt her from liability. *The John Munn —Richardson* (in note), 266.

OPTION.

Electa una via, non datur recursus ad alteram.

Where a party had his option to proceed either before the Trinity House or before the Admiralty, and made his option of the former, by that he must abide as well in respect of the execution of the judgment as in the obtaining of it. *The Phœbe— Raltray*, 59.

ORDERS IN COUNCIL.

1. At the Court of St. James's the 27th June, 1832; 6.

At the Court at Brighton the 20th November, 1835, referred to, 64, 141.

2. Cases upon:—

The John and Mary, *Marshall*, 64.

The London, *Dodson*, 140.

See Fees; Practice; Rules and Regulations; Table of Fees.

OWNERS.

1. Owners of vessels are not exempt from their legal responsibility, though their vessel was under the care and management of a pilot. *The Cumberland—Tickle*, 75.

2. Change of the owner, by the sale of a ship at a British port, does not determine a subsisting contract of seamen, and entitle them to wages before the termination of the voyage. *The Scotia—Risk*, 160.

3. The Court of Admiralty has authority to arrest a ship upon the application of the owner, in a case of possession. *The Mary and Dorothy — Teasdale*, 187.

4. Having a pilot on board, and acting in conformity with his directions, does not discharge responsibility of owner. *The Lord John Russell— Young*, 190.

PASSENGER.

1. The relation of master and passenger produces certain duties of protection by the master analogous to the powers which the law vests in him as to all the persons on board his ship; any wilful violation of which duties, to the personal injury of the passenger, entitles the latter to a remedy in the Admiralty, if arising on the high seas. *The Friends —Duncan*, 118.

2. Unless in cases of necessity, the master cannot compel a passenger to keep watch, *ib.* 120.

3. Master may restrain a passenger

pensation beyond what the crew have received. *The Jane—Custance*, 256.

3. In actions by seamen for wages the Court will not of course sanction settlements made with parties out of court, unless their proctors are consulted and approve them. *The Thetis —Watkinson*, 363.

See COSTS—PROCTOR.

RECOUPMENT.

1. The mate of a vessel is chargeable for the value of articles lost by his inattention, and the amount may be deducted from his wages. *The Papineau—Maxwell*, 94.

2. Damages occasioned to the ship by the mismanagement of the pilot may be set off against his claim for pilotage. *The Sophia—Easton*, 96.

REGISTRAR AND MERCHANTS.

Cases referred to:—
The Lord John Russell, 198.
John Munn, 266.
Crescent, 293.
Roslyn Castle, 307.

RELEASE.

Witnesses examined under a release. *The Lord John Russell—Young*, 194.

RES JUDICATA.

1. Defence grounded on a *res judicata* must be specially pleaded. *The Agnes—Taylor*, 53.

2. Where there had been a previous judgment of the Trinity House upon the same cause of demand, the Court declined to exercise jurisdiction. *The Phœbe—Raltray*, 59.

3. A Court of competent jurisdiction having decided the facts which were directly in issue, the party is estopped from trying the same facts again, *ib.* 60.

4. To allow two several suits for the same cause of action in two several Courts would lead to a worse than useless multiplication of law-suits, would be highly vexatious to parties, and would subject Courts to discredit from contrariety of co-existing decisions of equal authority in separate tribunals upon the same matters, *ib.* 61.

REVENUE CASES.

See VICE-ADMIRALTY COURT, 5, 6.

RIGHT OF RETENTION.

See LIEN.

RIVER ST. LAWRENCE.

See ADMIRALTY, 6, 8, 11, 17; COLLISION, 4, 8, 11, 16; JURISDICTION, 3, 8, 12, 13, 16; VICE-ADMIRALTY COURT, 2, 4, 10, 12, 19.

RULE OF THE SEA.

1. It is a generally received opinion among seamen, that it is imprudent and improper to anchor directly a-head or directly a-stern of another vessel in the direction of the tides or prevailing winds, unless at such or so great a distance as would allow time for either vessel to take measures to avoid collision in the event of either driving from her anchors. *The Cumberland —Tickle*, 79.

2. It is moreover the usual practice

not to anchor near to and directly in another vessel's hawse, that is, directly a-head and in the direction of the wind and tide; and in books which treat on seamanship it is mentioned as a thing to be avoided, not only to prevent accidents from driving in bad weather, but also in order that either vessel may be able to get under weigh without risk of collision with the other, *ib.* 80.

3. It is a rule universally received among seamen, and to be found in books on seamanship, that when there is doubt, the vessel on the larboard tack is to bear up or heave about for the vessel on the starboard tack. *The Nelson Village—Power*, 157.

4. When a ship is in stays, or in the act of going about, she becomes for the time unmanageable, and in this case it is the duty of every ship that is near her to give sufficient room. *The Leonidas—Arnold*, 229.

5. When a ship goes about very near to another, it is her duty to give a preparatory indication, from which that other can, under the circumstances, be warned in time to make the necessary preparations for giving room, *ib.*

6. When two vessels are approaching each other, both having the wind large, and are approaching each other so that if each continued in her course there would be danger of collision, each shall port helm so as to leave the other on the larboard hand in passing. *The Niagara—Taylor*, 315.

7. But it is not necessary, that because two vessels are proceeding in opposite directions, there being plenty of room, the one vessel should cross the course of the other, in order to pass her on the larboard, *ib.*

8. It is the duty of every vessel seeing another at anchor, whether in a proper or improper place, and whether properly or improperly anchored, to avoid, if practicable and consistent with her own safety, any collision. *The John Munn—Richardson* (in notes), 266.

9. One who has the management of a ship is not allowed to follow that rule to the injury of the vessel of another, when he could avoid the injury by a different course. *The Niagara—Taylor*; *The Elizabeth—Nowell*, 323.

10. Rule as to ships meeting each other. Merchant Shipping Act, 1854, which came into operation on 1st May, 1855 (17 & 18 Vict. c. 104, s. 296). *The Inga—Eilertsen*, 335; COLLISION, 53.

11. Where two ships, close hauled, on opposite tacks meet, and there would be danger of collision if each continued her course, the one on the port tack shall give way, and the other shall hold her course, unless by so doing she would cause unnecessary risk to the other. *The Mary Bannatyne*, 353.

Nor is the other bound to obey the rule, if by so doing she would run into unavoidable or imminent danger; but if there be no such danger, the one on the starboard tack is entitled to the benefit of the rule, *ib.*

5. Though proceeding only from a spirit of eager competition, and from miscalculation rather than from any attempt to injure the competing vessel, *ib.*

6. Steamers are to be considered in the light of vessels navigating with a fair wind. *The Niagara—Taylor; The Elizabeth—Nowell*, 314.

7. Every steam-ship when navigating any narrow channel shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steam-ship. The Merchant Shipping Act, 1854. *The Inga—Eilertsen*, 335.

8. When two or more steam-boats of unequal speed shall be pursuing the same course within the limits of the port of Quebec, the slowest boat, if a-head, shall draw on the left and allow the one at the stern to pass on the starboard side.

See *By-law of Trinity House of Quebec of 12th of October*, 1855.

STEAM NAVIGATION ACT.

English Steam Navigation Act (14 & 15 Vict. c. 79) cited. *The Inga—Eilertsen*, 339.

STEAM-TUGS.

1. Sailing vessel running foul of another coming up the St. Lawrence in tow of a steam-tug, condemned in damages. *The Niagara—Taylor*, 308.

2. A vessel in tow, with a head wind and no sails, and fast to a steamer, is powerless to a very great extent; and can only sheer to a certain distance on either side of the course in which she is towed, *ib.* 314.

3. If the misconduct of those on board the tug be the sole cause of the collision, both the other vessels are exempt from responsibility, and the recourse of the injured vessel is against the tug, *ib.* 319.

4. The tow is not responsible for an accident arising solely from the mistake or misconduct of the tug, *ib.*

5. Sailing vessel condemned in damages and costs for putting her helm to starboard, and passing to the left a steam tow-boat, thereby causing collision with the vessel in tow; the steamer and her tow coming down the channel nearly or exactly upon a line with the course of the sailing vessel. *The Inga—Eilertsen*, 335.

6. Liability of a steam-tug for collision between vessels, one of which was towed by the steamer. *The John Counter—Miller*, 344.

7. Where the accident arises from the fault of the tow, without any error or mismanagement on the part of the tug, the former alone is answerable, *ib.* 348.

8. If both be in fault, both vessels are liable to the injured vessel, whatever may be their responsibility *inter se*, *ib.*

STEWARD.

Steward displaced and punished without cause, is not bound to serve as a cook, and may recover his wages. *Sarah—Sinclair*, 87.

and the office has been continued by a succession of commissions down to this time. *The London—Dodson*, 147.

2. By 2 Will. 4, c. 51, s. 6, doubts are removed as to the jurisdiction of the Vice-Admiralty Courts in the possessions abroad, with respect to seamen's wages, pilotage, bottomry, damage to a ship by collision, contempt in breach of regulations and instructions relating to His Majesty's service at sea, salvage, and droits of Admiralty, 4.

3. In all cases where a ship or vessel, or the master thereof, shall come within the local limits of any Vice-Admiralty Court, it shall be lawful for any person to commence proceedings in any of the suits hereinbefore mentioned in such Vice-Admiralty Court, *ib.*

4. Notwithstanding the cause of action may have arisen out of the local limits of such Court, and to carry on the same in the same manner as if the cause of action had arisen within the said limits, *ib.*

5. The Court of Vice-Admiralty in the colonies has a concurrent jurisdiction with the Courts of Record there, in the case of forfeitures and penalties incurred by the breach of any Act of the Imperial Parliament relating to the trade and revenues of the British possessions abroad. See The Customs Consolidation Act, 1853 (17 & 18 Vict. c. 107, s. 183).

6. So in the case of any penalties and forfeitures incurred by the breach of the Act of the Legislature of Canada, consolidating the duties of customs, or by the breach of any other Act relating to the customs or to trade or navigation, concurrent jurisdiction is given to the Court of Vice-Admiralty with the Courts of Record (Provincial stat. 10 & 11 Vict. c. 31, s. 51).

7. So it has jurisdiction in the case of any penalties incurred by the breach of the proclamation of the 1st of January 1801, prohibiting the use of colours worn in Her Majesty's ships (8 & 9 Vict. c. 87).

8. The Court cannot, in cases of pilotage, enforce a judgment of the Trinity House upon the same cause of demand. *The Phœbe—Raltray*, 59.

9. The jurisdiction of the Court is not ousted by the provisional statute 45 Geo. 3, c. 12, in relation to claims of pilots for extra-pilotage in the nature of salvage for extraordinary services rendered by them. *The Adventure—Peverley*, 101.

10. In a case of wreck in the River St. Lawrence (Rimouski), the Court has jurisdiction of salvage. *The Royal William—Pennel*, 107.

11. The jurisdiction of the Court as to torts depends upon the locality, and is limited to torts committed on the high seas. *The Friends—Duncan*, 112.

12. Torts committed in the harbour of Quebec are not within the jurisdiction of the Court, *ib.*

13. It has jurisdiction of personal torts and wrongs committed on a passenger on the high seas by the

fifty pounds shall be instituted by or on behalf of any seaman or apprentice in any Court of Admiralty or Vice-Admiralty, or in the Court of Session in Scotland, or in any superior Court of Record in Her Majesty's dominions, unless the owner of the ship is adjudged bankrupt or declared insolvent, or unless the ship is under arrest or is sold by the authority of such Court as aforesaid, or unless any Justices acting under the authority of this Act refer the case to be adjudged by such Court, or unless neither the owner nor master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore (17 & 18 Vict. c. 104, s. 189), 358.

3. Summary tribunal for the trial of seamen's suits for the recovery of their wages, for any amount not exceeding fifty pounds, before any two Justices of the Peace acting in or near to the place at which the service has terminated (*ib.* s. 188).

4. It is a good defence to a suit for wages by a seaman, that he could neither steer, furl, nor reef. *The Venus—Butters*, 92.

5. Discharge and wages demanded on the ground that the vessel was not properly supplied with provisions on the voyage to Quebec, whereby seamen's health had been impaired, and they were unable to return. The circumstances of the case examined, and the master dismissed from the suit, the seamen returning to their duty. *The Recovery—Simkin*, 128.

6. Imprisonment of a seaman by a stranger for assault does not entitle him to recover wages during the voyage and before its termination. *The General Hewitt—Sellers*, 186.

7. The detention of a vessel during the winter by stranding in the river St. Lawrence, on her voyage to Quebec, where she arrived in the succeeding spring, does not defeat the claim of the seamen to wages during the winter. *The Factor—Price*, 183.

8. Seaman going into hospital for a small hurt not received in the performance of his duty, not entitled to wages after leaving the ship. *The Captain Ross—Morton*, 216.

9. In cases arising out of the abrupt termination of the navigation of the St. Lawrence by ice, and a succession of storms in the end of November, seamen shipped in England on a voyage to Quebec and back, to a port of discharge in the United Kingdom, entitled to have provision made for their subsistence during the winter, or their transportation to an open sea-port on the Atlantic, with the payment of wages up to their arrival at such port. *The Jane—Custance*, 256.

10. The master is not at liberty to discharge the crew in a foreign port, without their consent; and if he do, the maritime law gives the seamen entire wages for the voyage, with the expenses of return, *ib.*

11. Circumstances, as a *semi-naufragium*, will vest in him an authority to do so, upon proper conditions, as by providing and paying for their return passage, and their wages up to the time of their arrival at home, *ib.*